CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 118

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1929

CERTIORARI GRANTED OCTOBER 14, 1929

(34,249)

(34,249)

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in the United States circuit court of appeals, fifth circuit	*a*	1
Caption (omitted in printing)	*a*	
Record from the district court of the United States, Western Louisiana	1	1
Petition	1	1
Claim for refund	9	6
Answer	13	9
Stipulation waiving trial by jury	18	12
Motion of plaintiff for directed verdict	18	12
Special request for finding of law and fact	19	13
Opinion, Dawkins, J	21	15
Judgment	30	21
Bill of exceptions and order settling same	30	21
Assignment of errors	35	25
Motion and order for appeal	36	25
Appeal bond (omitted in printing)	37	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1929

	Original	Print
Note of evidence	38	26
Minutes of the court	41	28
Præcipe for transcript of record	43	29
Exhibits P1-P2—Income and profits-tax return for 1918.	44– 1	30
Tentative return and estimate for income and profits taxes and request for extension of time to file return	44–14	30
Exhibit "P-3"—Income and profits-tax waiver for 1918.	45	30
Exhibit "P-4"—Notice from Treasury Department, dated June 10, 1925, and statement attached.	47	32
Demand for payment	50	33
Exhibit "P-5"—Franked envelope	51	34
Exhibit "P-6"—Claim for refund	51	34
Clerk's certificate (omitted in printing)	56	
Argument and submission (omitted in printing)	57	
Opinion, Bryan, J	58	38
Judgment	62	40
Petition for rehearing (omitted in printing)	63	
Order denying rehearing	70	41
Clerk's certificate (omitted in printing)	71	
Order allowing certiorari	72	41

[fols. a-c] [Caption omitted]

[fol. 1]

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA

No. 1623. At Law

FLORSHEIM BROTHERS DRY GOODS CO.

versus

UNITED STATES OF AMERICA

PETITION—Filed Oct. 15, 1926

To the Honorable Ben C. Dawkins, Judge United States District Court in and for the Western District of Louisiana:

The petition of the Florsheim Brothers Dry Goods Company, Ltd., represented herein by the undersigned counsel, with respect represents:

1

That it is a corporation organized under the laws of the State of Louisiana with its domicile at Shreveport, Caddo Parish, said State, and having its principal place of busi-[fol. 2] ness in said City, Parish and State in the Western District of Louisiana, within the territory and jurisdiction of, and subject to the jurisdiction of this Honorable Court.

2

That it is engaged in the general wholesale dry goods and notion, or commonly called jobbing business, located at said city in said Parish and State, and doing said business in the trade territory thereof.

3

That the United States of America is justly, truly and legally indebted unto your petitioner in the sum of Eleven Thousand Five Hundred Seventeen and 57/100 ($11,517.57)

Dollars, together with six per cent (6%) per annum interest thereon from the respective dates of payments, as hereinafter set out, together with all costs of this suit.

4

That petitioner, in accordance with law, and particularly in accordance with a memeographed letter dated February 27th, 1919, filed by Daniel C. Roper, Commissioner of Internal Revenue, relative to extension of time for filing returns, did prepare and file with the then Collector of Internal Revenue of the United States, in the District of Louisiana, a tentative return for and covering the operation for the year ended December 31, 1918.

5

That said tentative return was so filed, as above set forth, prior to March 15, 1919, and petitioner obtained an extension for the filing of complete return to June 15, 1919.

[fol. 3] 6

That on June 14, 1919 said complete return, prepared under provisions of Revenue Act of 1918, was mailed at Shreveport, La., addressed to the Collector of Internal Revenue, at New Orleans, La., (June 15, 1919, being a Sunday) and same was received by said Collector June 16, 1919.

7

That said final return showed taxes to be due in the amount of $66,982.82, which said amount was paid by petitioner to and accepted by the then Collector of Internal Revenue for the District of Louisiana.

8

That subsequently an examination of said return for the year 1918 was made and on May 21, 1924, the Income Tax Unit (file reference IT:CA:L:2334-6) addressed a communication to petitioner advising that as the result of such examination an additional tax was in order to be assessed for said year amounting to $24,089.97.

9

That an exception was taken to said finding and an appeal was presented to the Hon. Commissioner of Internal Revenue and a hearing had thereon.

10

That the five year statute of limitation prescribed by the Acts of Congress of United States and particularly Section 277 of the Revenue Act of 1924 fixing the time within which the Commissioner might make an assessment and collect [fol. 4] same, expired March 15, 1924, but petitioner executed an instrument on March 1, 1924, purporting to extend the time for making assessment and collecting same, for one year after the expiration period of statutory period of limitation which was the only instrument executed by petitioner purporting to extend said time, and petitioner now avers that said purported extension or renunciation of prescription executed by it on March 1, 1924, was and is illegal, null, void and of no effect, being prohibited by Article 3460 of the Civil Code of Louisiana, which is now urged in bar of any renunciation or extension of prescription which may be claimed to have resulted by reason of petitioner's execution of said instrument as above alleged.

11

That under date of June 10, 1925 (file reference IT: ELSM:A-19896) the Hon. Commissioner advised petitioner that there was a deficiency in the sum of $11,282.15, which would be immediately assessed.

12

That notice of such assessment and demand, dated June 18, 1925, for the payment of said amount, was mailed from New Orleans, La., on said date, demanding payment thereof within ten days from receipt of said notice and demand.

13

That petitioner protested against the payment of said amount presented to the Collector of Internal Revenue petitioner's position that the time within which an assessment

and collection could be made had elapsed which protest was [fol. 5] without avail and that, with reservation of petitioner's rights, subject to its protest and under duress, fearing that writs would be issued by the Collector of Internal Revenue and its property seized in satisfaction of said taxes, petitioner paid said amount on dates and in the sums as follows:

August 28, 1925, paid on tax	$1,282.15
September 4, 1925, int. on tax	112.82
September 26, 1925, paid on tax	2,000.00
September 30, 1925, int. on tax	50.00
October 28, 1925, paid on tax	2,000.00
November 2, 1925, int. on tax	40.00
November 28, 1925, paid on tax	2,000.00
November 28, 1925, int. on tax	30.00
December 30, 1925, paid on tax	520.19
December 30, 1925, int. on tax	2.60

balance of said tax being paid as of date December 30, 1925, by claims of credit for allowances made for over-assessment in the years 1917, 1919 and 1920; total amount of tax so paid being $11,282.15 interest thereon paid amounting to $235.42.

14

That petitioner has exhausted all its remedies before the income tax unit and before the Commissioner of Internal Revenue before paying said tax and that same was paid under protest and duress in order to prevent petitioner's property being seized and sold to satisfy said tax, and that petitoner is compelled to appeal to judicial process to enforce its legal rights and obtain redress from the illegal, erroneous and wrongful acts herein complained of.

[fol. 6] 15

That the time for making an assessment of taxes and collecting same, prescribed by the Acts of Congress and particularly Sec. 277 of the Revenue Act of 1924, had already elapsed before there were any proceedings taken for the collection of the tax paid, as above set forth (the petitioner alleging that the time therefor having expired on

March 15, 1924, being five years from the date said tax was originally due, or in the alternative on June 16, 1924, five years from the filing of the return, if the Court should so hold, or that the latest possible date under any theory, June 16, 1925, if the Court should hold that prescription begins to run from the filing of the final return and waiver is held to be valid) the notice and demand being dated June 18, 1925, mailed from New Orleans on said date and subsequently received at Shreveport by petitioner, which notice gave petitioner ten days' additional time before any writ could have issued to enforce the collection thereof, and accordingly the assessment of said amount of $11,282.15 was illegally made and the collection thereof illegally enforced, without any warrant or authority in law.

16

That on or about the 20th day of February 1926, petitioner filed with the Commissioner of Internal Revenue its claim for refund of taxes so illegally collected, according to provisions of law in that regard, and regulations of the Secretary of the Treasury established in pursuance thereof, as shown by copy of said claim hereto attached and made part thereof, and that more than six (6) months has elapsed since said date with no hearing on said claim had and no decision rendered thereon.

[fol. 7]

17

That the Collector of Internal Revenue, by whom said tax and interest was collected, is not now in office as Collector of Internal Revenue, said amounts having been collected by Hon. D. A. Lines, said D. A. Lines being succeeded by Hon. J. O. Bender about March, 1926, who is now the Collector of Internal Revenue at New Orleans.

Wherefore, Petitioner prays that copies of this petition be served upon the proper officials and representatives of the United States of America, in accordance with law; that the United States of America and its proper officials be cited to appear and answer hereto, and upon trial hereof that there be judgment herein in favor of petitioner, against the United States of America and that petitioner

do have and recover judgment from and against the United States of America in the full sum of $11,517.57 with interest on the sum of $1,282.15 from August 28, 1925 until paid; at the rate of 6% on the sum of $112.82 from September 4, 1925 until paid, with like rate of interest; on the sum of $2,000.00 from Sept. 26, 1925 until paid, with like rate of interest; on the sum of $50.00 from September 30, 1925 until paid with like interest; on the sum of $2,000.00 from Oct. 28, 1925, until paid with like interest; on the sum of $40.00 from Nov. 2, 1925 until paid with like interest; on the sum of $2,030.00 from Nov. 28, 1925 until paid with like interest; and on the sum of $4,002.60 from Dec. 30, 1925 until paid, with like interest together with all costs of this suit.

Petitioner further prays for all other orders and decrees necessary and proper, for general relief.

Wise, Randolph, Rendall & Freyer, Attorneys.

[fol. 8] *Duly sworn to by Seymour L. Florsheim. Jurat omitted in printing.*

STATE OF LOUISIANA,
Parish of Caddo:

Before me, the undersigned authority, personally came and appeared A. B. Freyer, who being first duly sworn deposes and says that he is a member of the firm of Wise, Randolph, Rendall & Freyer, attorneys for plaintiff in the above suit of Florsheim Brothers Drygoods Company, Ltd. vs. United States of America, and that a copy of the petition filed in said suit has been mailed by registered letter addressed to the Attorney General of the United States at Washington, D. C., on this date.

A. B. Freyer.

Sworn to and subscribed before me this 15th day of October, 1926. L. B. Foye, Notary Public, Caddo Parish, La. (Seal.)

[fol. 9] Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S. January 18, 1922.

(Execute separate form for each tax period.)

Claim for

— Abatement of tax assessed.
— Credit against outstanding assessments.
— Refund of taxes illegally collected.
— Refund of amounts paid for stamps used in error or excess.

Important: File with Collector of Internal Revenue where assessment was made. Not aceptable unless completely filled in.

Notice to Collector: Collector musts indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit: Stamp here ——.

Collector's notation: District: ——. Account number: ——. Date received: Stamp here: ——. —— ——, Collector of Internal Revenue.

State of Louisiana,
County of Caddo, ss:

Type or print: (Name of taxpayer or purchaser of stamps:) The Florsheim Bros. Dry Goods Co., Ltd.; (Residence—give street and number as well as city or town and State:) 510-16 Commerce Street, Shreveport, Louisiana; (Business address:) ——.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpawer named, and that the facts given below with reference to said statement are true and complete:

[fol. 10] 1. Business in which engaged—Wholesale Dry Goods, Notions and Furnishings. Period from Jan. 1, 1918, to Dec. 31, 1918.

2. Character of assessment or tax— ——. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased—Original $66,982.82 additional $78,264.97.

4. Reduction of Tax Liability requested (Income and Profits Tax)—$11,282.15.

5. Amount to be abated—none.

6. Amount to be refunded (or such greater amount as is legally refundable)—$11,282.15.

7. Dates of payment: (See Collector's receipts or indorsements of canceled checks.) (If statement covers tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed—Louisiana.

9. District in which unpaid assessment appears—None unpaid.

10. Amount of overpayment claimed as credit—none.

11. Unpaid assessment against which credit is asked; period from—to—none.

[fol. 11] Deponent verily believes that this application should be allowed for the following reasons:

Return was for calendar year 1918. Return was filed on or before March 15, 1919. Five year statute of limitation prescribed by Sec. 277 of the Revenue Act of 1924, caused the time within which the Commissioner might make assessment to expire on or before March 15, 1924; this however was extended to December 31, 1924, by taxpayer signing a waiver of the statute of limitation. This was not further extended. Under date of June 10, 1925, file reference IT: E:S:A-19896 the Commissioner advised taxpayer a deficiency in the sum of $11,282.15 was being immediately assessed, under Section 274 (d) of the Revenue Act of 1924. In due course notice and demand for the payment of $11,282.15 was received which taxpayer paid under protest after having been granted permission to extend payment thereof as provided in Section 270 of the Revenue Act of 1924. Taxpayer in application for this extension made its position clear that the correctness and legality of the tax was not being accepted, and was being paid only to avoid distraint and seizure. It was at that time contended and is here made the basis of this claim that the tax was not assessed with the required time, therefore is a tax, illegally collected and should be refunded. In this position taxpayer cites the case of New York and Literage Company vs. Bowers, Collector, decided by the United States District Court for the Southern District of New York on February 13, 1925, and in turn affirmed by the Circuit Court of Appeals for the Second Circuit on February 1, 1926.

(Attach additional sheets if necessary.)

[fol. 12] (Signed) The Florsheim Bros. Dry Goods Co. Ltd.,
by (Signed) Seymour Florsheim, President.

Sworn to and subscribed before me this 19th day of February, 1926. (Signed) A. B. Freyer, (Title:) Notary Public. (Seal.)

Filed Oct. 15, 1926. W. B. Lee, Clerk U. S. Dist. Court, West. Dist. of Louisiana.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)
2—11704.
Citation and Marshal's Return thereon omitted.

* * * * * * *

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Dec. 30, 1926

Now comes the United States of America, made defendant herein, appearing through Philip H. Mecom, United States Attorney, and J. Fair Hardin, Assistant United States Attorney, for the Western District of Louisiana, and makes answer to Plaintiff's petition, as follows:

1

The allegations of paragraph 1 are admitted.

2

The allegations of paragraph 2 are admitted.

3

Defendant especially denies that it is justly, truly and legally indebted unto Plaintiff in the sum of $11,517.57, or any amount whatsoever.

4

It is admitted that the Plaintiff filed a so-called tentative return therein requesting an extension of time for filing

its income tax return for the year 1918, but in all other respects the allegations of said paragraph are denied.

[fol. 14] 5

It is admitted that the so-called tentative return of Plaintiff was filed prior to March 15, 1919, and that Plaintiff obtained an extension of time for the filing of its return for the year 1918, but in all other respects the allegations of said paragraph are denied.

6

The allegations of paragraph 6 are admitted.

7

The allegations of paragraph 7 are admitted.

8

The allegations of paragraph 8 are admitted.

9

The allegations of paragraph 9 are admitted.

10

Defendant denies the allegations contained in paragraph 10 of Plaintiff's petition.

11

Defendant admits that under date of June 10, 1925, the Plaintiff was advised that under the provisions of Sub-Division (d) of Section 274 of the Revenue Act of 1924, additional taxes in the amount of $11,282.15 had been assessed.

[fol. 15] 12

Defendant admits that notice of such assessment and demand for payment of said tax issued June 18, 1925, and that said notice is the best evidence of its contents.

13

Defendant admits the following payments were received from Plaintiff:

Tax

Aug. 31, 1925	$1,282.15
Sept. 28, 1925	2,000.00
Oct. 29, 1925	2,000.00
Nov. 30, 1925 (Cr. Over payment 1919)	1,481.55
Dec. 2, 1925	2,000.00
Dec. 5, 1925 (Cr. Over payment 1917)	1,998.26
Jan. 2, 1926	520.19

Interest

9- 4-25	$112.82
10- 1-25	50.00
11- 2-25	40.00
11-30-25	30.00
1- 2-26	2.60

The total amount of taxes paid being $11,282.15 and the total amount of interest thereon paid amounting to $235.42, all of which payments were made under protest, but in all other respects the allegations of this paragraph are denied.

[fol. 16] 14

Defendant admits that the Plaintiff duly filed an appeal from said assessment, and after payment of the tax set out filed a claim for refund, but otherwise denies the allegations of paragraph 14.

15

The allegations of paragraph 15 are denied.

16

Defendant admits that on March 3, 1926, the Plaintiff filed a claim for the refund of the additional taxes so paid, and that at the time of the filing of this suit no action had been taken on such claim for a refund by the proper officers of the Defendant, but in all other respects the allegations of said paragraph are denied.

It is admitted that the Collector of Internal Revenue, who collected the said additional taxes and interest is not now in office and was not in office on the date this suit was filed.

Wherefore defendant prays that the demand of Plaintiff be rejected and this suit be dismissed at the costs of Plaintiff, and for full, general and equitable relief in the premises.

Philip H. Mecom, United States Attorney. J. Fair Hardin, Assistant United States Attorney.

[fol. 17] *Duly sworn to by Philip H. Mecom. Jurat omitted in printing.*

I certify that I have mailed a carbon copy hereof to opposing counsel of record, Dec. 30, 1926.

Philip H. Mecom.

[fol. 18] In United States District Court

Stipulation Waiving Trial by Jury—Filed Nov. 10, 1927

It is hereby stipulated and agreed by and between the parties to the above entitled action that a jury be and is hereby waived, and the case to be tried by the Court without a jury.

Done and signed at Shreveport, Louisiana, on this the 10th day of November, 1927.

Wise, Randolph, Rendall & Freyer, Attorneys for Plaintiff. Philip H. Mecom, United States Attorney, Attorney for Defendant.

In United States District Court

Motion for Directed Verdict—Filed Nov. 10, 1927

Now comes the Florsheim Brothers Drygoods Company, Ltd., plaintiff in the above numbered and entitled cause, represented herein by undersigned counsel, and at the con-

clusion of the introduction of all evidence by the plaintiff and the defendant herein, files this its motion for a directed verdict, in favor of the plaintiff and against the defendant, as prayed for in the petition.

Wherefore, Premises considered, appearer moves that the Court direct itself, acting in place of a jury, to find a verdict for the plaintiff and against defendant in the amount sued for.

[fol. 19] Further prays for all other orders and decrees necessary for costs and general relief.

Wise, Randolph, Rendall & Freyer, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

SPECIAL REQUEST FOR FINDING OF LAW AND FACT ATTACHED TO PLAINTIFF'S BRIEF—Filed Jan. 2, 1928

1. Accordingly, in consideration our motive for a directed verdict filed at the conclusion of the evidence in this case (the jury having been waived by written stipulation of counsel filed in the record) we ask that the Court find as a fact that there is no proof in the record that a proper and legal assessment was made within the statutory period as extended by the agreement or waiver, and therefore the case is governed by Section 277 of the Revnue Act of 1924 or 1926 if either of these acts are held to apply to this case, and the Government had no right to collect the tax at the time it was demanded and its payment enforced.

2. We further ask that the Court find that an agreement was entered into between the Government and plaintiff, in writing, executed by the Commissioner under authority of the Revenue Act of 1921, fixing the period of time within which the tax for 1918 should be determined, assessed and collected as not later than June 16, 1925; that such agree-[fol. 20] ment became the law governing the collection of said tax as between the parties, exclusive of any subsequent Act of Congress in derogat*ing* of plaintiff's rights fixed under said agreement; that the tax was not assessed and collected within the period fixed in said agreement and that at the time the payment of the tax was demanded and en-

forced the Government had no legal right to collect the same and it should therefore be refunded.

3. We further request that the Court find that Section 278 of the Revenue Act of 1924 does not apply to this case for the reason that said Act was not retroactive in effect; that no assessment was actually made within the statutory period (even accepting the theory of the Government that an assessment was made prior to June 16, 1925) which statutory period referred to in said Act referred to the period fixed by the statute and not to that fixed by convention, which contemplated and included the actual collection of the tax as well as its assessment within a stipulated period; and lastly, for the reason that this Section of the Act of 1924 had been amended by the Act of 1926 prior to the filing of this suit, which last named Act specifically declared its retroactivity.

4. That the Court find that the Government had no right to collect the tax in question at the time its demand was made and enforced against the plaintiff, under the Revenue Act of 1926, if it is held to govern this case, for the reason that paragraph (d) of Section 278 of said Statute expressly holds, even in cases where the assessment has been made within the statutory period, that the collection of the tax cannot be enforced unless the proceedings are begun prior to the expiration of the period of collection agreed upon in writing by the Commissioner and taxpayer, which period [fol. 21] in this case was fixed by such written agreement as on or before June 16, 1925, and accordingly the payment of the tax was illegally enforced subsequent to that date and should be refunded.

Accordingly, we respectfully pray that there be judgment herein as prayed for in the petition.

Respectfully submitted.

Wise, Randolph, Rendall & Freyer, Attorneys for Plaintiff. A. B. Freyer.

W. B. Lee, Clerk.

IN UNITED STATES DISTRICT COURT

OPINION—Filed Feb. 6, 1928

DAWKINS, J.:

Plaintiff brings this suit to recover back from the government the sum of $11,517.57, paid under protest as income, war profit and excess profit taxes for the year 1918. It made a tentative return before the 15th day of March, 1919, and obtained an extension under which its final figures were submitted and filed on June 16th of that year. Subsequently, there was a re-examination of the return and on March 1, 1924, an agreement was signed with the government, reading as follows:

[fol. 22] "In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Florsheim Bros. Dry Goods Co. Ltd. of Shreveport, La., and the Commissioner of Internal Revenue, hereby consent to a determiation, assessment, and collection of the amount of income, excess profits, or war profits taxes due under any return made by or on behalf of the said Florsheim Bros. Dry Goods Co. Ltd., for the year 1918 under the Revenue Act of 1921, or under prior income, excess profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation, as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned."

On June 10, 1925, the Deputy Commissioner mailed to plaintiff the following letter, to wit:

"In accordance with the provisions of Section 274 (d) of the Revenue Act of 1924, there has been assessed against you an income and profits tax amounting to $11,282.15 for the taxable year 1918, the details of which are set forth in the attached statements.

Under the provisions of Section 379 (a) of the Act you have the right to file with the Collector of Internal Revenue,

within ten days after notice and demand for payment, a claim for abatement of this tax or any part thereof. The claim should have attached to it all evidence and data upon which you rely for support thereof, and should be accom- [fol. 23] panied by a bond not exceeding double the amount of the claim, with such sureties as the Collector deems necessary. When the claim is received by the Collector it will be transmitted to the Commissioner of Internal Revenue, Washington, D. C., who will notify you of the action taken."

Attached thereto was the following Statement:

"Deficiency in Tax

Calendar Year 1918, $11,282.15

You are advised that after careful consideration and review, your aplication under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of Revenue act of 1928 has been allowed. Your profit tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business as to that of your company.

The result of the audit under the above mentioned provisions is as follows:

Profits Tax, Section 328			$71,135.36
Net income, Bureau letter dated May 21, 1924		$132,648.81	
Less: Additional Depreciation allowed on Furniture and Fixtures capitalized—10% of $1,000.00		100.00	
Corrected net income		$132,548.81	
Less: Profit Tax	$71,135.36		
Exemption	2,000.00		
		73,135.36	
[fol. 24] Balance taxable at 12%		59,413.45	7,129.61
Total Tax assessable			$78,264.97
Tax previously assessed: Account No. 41732			66,982.82
Additional Tax			$11,282.15"

Subsequently, under date of June 18, 1925, there was mailed to the taxpayer a green slip, reading:

"Notice and Demand for Income Tax

United States Internal Revenue Service

Notice is hereby given that there has been assessed against you the amount stated hereon. Demand is hereby made for immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that interest at the rate of 1 per cent per month will accrue from the due date. Date: June 18, 1925.

To the Collector of Internal Revenue at New Orleans.

Name and address: Florsheim Bros. Dry Goods Co., Ltd., Shreveport, La., 518 Commerce St.

Items: ——; Total Assmnt. 11,282.15.

Jun. OO C SPL No. 4.

Return this form with remittance."

Thereafter the sum claimed was paid in installments, as follows:

"Aug. 31, 1925, paid on tax	$1,282.15
Sept. 4, 1925, Interest on tax	112.82
Sept. 28, 1925, paid on tax	2,000.00
Sept. 28, 1925, interest on tax	50.00
Oct. 29, 1925, paid on tax	2,000.00
[fol. 25] Nov. 2, 1925, interest on tax	40.00
Nov. 30, 1925, paid on tax	2,000.00
Nov. 30, 1925, interest on tax	30.00
Jan. 2, 1926, paid on tax	520.19
Jan. 2, 1926, interest on tax	2.60"

This suit was filed on October 15, 1926, for a refund.

The only issue is the one of prescription or limitations. It is contended that, because these additional taxes were collected upon the return for the year 1918, both the right to assess and collect would have expired on June 16, 1924, but for the stipulation of waiver signed by the taxpayer on March 1st 1924, above quoted; and that in as much as the agreement was made under the law as it stood when exe-

cuted, both its language and effect was to extend only the rights and remedies as they existed at that time—that is, the government was bound to assess and collect the taxes within the stipulated year of extension.

It is conceded by the government that but for the extension these additional taxes would have had to be assessed and collected prior to June 16, 1924, but it claims that since the assessment was made within the extended period thereupon the provisions of the revenue act of 1924 became operative and the government had six additional years in which to collect.

It will be noted that the agreement itself refers to and is made "in pursuance of the provisions of sub-division (d) of Sec. 250 of the Revenue Act of 1921" and the taxpayer and commissioner "consent to a determination, assessment and collection of "the taxes" due under any return made by or on behalf of the taxpayer "for the year 1918 under the Revenue Act of 1921, or any prior acts." It is to remain in effect "for a period of one year after the expiration of the statutory period of limitation or the statutory period of [fol. 26] limitation as extended * * * within which assessment of taxes may be made for the year or years mentioned." In the meantime, that is between the date of the making of the agreement and the assessment and collection of the taxes in this case, the Revenue Act of 1924 was approved on June 2, 1924, which has been constructed by the Court of Appeals for this circuit in the case of U. S. vs. Crook, et al., 18 Fed. (2) p. 449, as giving the government six years within which to make collection, provided the assessment was made within the statutory period of five years. To this extent at least, it was decided that the Act of 1924 was applicable to the taxes accruing prior thereto and specifically for the year 1918 as the taxes in that case were for the same year as the present one. I apprehend, in view of this decision, if, notwithstanding the said agreement made on March 1st, 1924, after the passage of the Act of June 2, 1924, the commissioner had assessed the taxes before June 16th of that year, he would have had six additional years in which to make collection, as this would have put the case squarely within the ruling of Crook, et al., just cited. But the matter of prescription or limitations applicable to the claims of the government is one of grace, for it is the universal rule that none such run against the

sovereign except as allowed by statute. Therefore, in order for the plaintiff to escape in this instance, it is necessary that it point to circumstances which clearly bring it within that category. It must be remembered that the agreement was made both with respect to the law as it then existed and to the power of Congress to change it. In other words, the Act of June 2, 1924, could have not only extended the right to both assess and collect the taxes, but might have removed all limitations thereon had Congress seen fit so to do. However, it did not go that far but did provide, as held in the Crook case, if the assessment was made within the five years, the taxes might be collected at any time within six [fol. 27] years thereafter. While the agreement recites that the parties "consent to a determination, assessment and collection" of the taxes, it does not in that sentence declare that all of these acts shall be performed within the year. On the other hand, the concluding sentence reads that: "This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessment of taxes made for the year or years mentioned." The effect of this is to say that the assessment might be made up to the last minute of the period as extended, and if this could be done, it must have been contemplated that if assessed during that time such a procedure would be for some practical purpose; yet, if the taxes had also to be collected within that time this would hardly be possible in event the assessment was made on or about the last day. It is thus seen that under the language of the agreement it is by no means clear that the right to collect should be lost if not exercised within the extended period. On the other hand, the inference to be drawn from the wording of this last sentence is rather strong that the assessment was the main thing to be accomplished within that time. It is true that but for the Act of 1924 both rights would have expired on June 16, 1924, but since Congress had the power to extend them and it did enlarge the time for collection if the assessment was timely made, it must be held, in the absence of a clear and conclusive agreement lawfully made, that the effect was to enlarge the period for collection to six years,

where to assessment was made, either within the statute or within the time of any conventional extension.

[fol. 28] Counsel for plaintiff cites paragraph (d) of Sec. 278, of the Revenue Act of 1926, which provides that where the assessment has been made in accordance therewith, proceedings to collect shall be allowed only if commenced "(1) within six years after the assessment of the taxes; or (2) prior to the expiration of any period for collection agreed upon by the Commissioner and taxpayer." However, I hardly think that this was intended to permit an agreement which would shorten the six year period, but was rather to cover cases where, if the government failed to institute proceedings for collection within that time, the taxpayer might escape the consequences of execution by consenting, within six years, to collection after the running of such delay. Otherwise, it would have the effect of empowering the Commissioner to disregard this long period allowed by the Statute and to consent to a shortening thereof to three months or less, even if the assessment was timely made, which of course would scarcely be contended. See In Re McClure (N. D. of Ga.) 21 Fed. (2nd) p. 538, Adv. Sheets Nov. 3, 1927; United States vs. Russell, et al., 22 Fed., (2nd) 249; Adv. Sheets Dec. 29, 1927.

It is also contended that there was never any assessment of the additional taxes within the period as extended, that is prior to June 16, 1925. However, the letter of June 10, 1925, with statement of the taxes claimed, quoted earlier in this opinion, states clearly that "in accordance with the provisions of 274 (d) of the Revenue Act of 1924, there has been assessed against you (the plaintiff) an income tax amounting to $11,282.15, for the taxable year 1918, the details of which are set forth in the attached statement." There also appears upon the original return as filed June 16, 1924, the notation, appearing to have been stamped upon its face in a square block, headed "Audited"; "Tax Liability increase $11,282.15;" signed "I. Graff," dated [fol. 29] Feb. 2nd (or 7th), 1925." I take it that this was all that was necessary to constitute an assessment as nothing has been pointed out to show that any particular form was required to accomplish that result. There is no denial that the letter of June 10th, 1925, was duly and timely received and it must be presumed that it was as it was offered in evidence by the plaintiff. It is true that the green slip,

also quoted and referred to hereinabove, bore date June 18, 1925, but this was in the nature of a demand or bill with warning to pay within ten days or the taxpayer would incur the statutory penalty of 1% a month. From this I think it is shown that there was an assessment prior to June 16, 1925.

My conclusion is that the plea of limitations cannot be sustained and there should be judgment rejecting plaintiff's demand. Appropriate indorsements showing the granting or refusing of requested findings of fact and rulings of law have been noted upon said motions.

A decree in accordance with these views may be presented, at which time all exceptions will be settled.

Thus done and signed at Monroe, Louisiana, on this the 4th day of February, A. D. 1928.

Ben C. Dawkins, U. S. D. J.

[fol. 30] In United States District Court

Judgment—Filed Feb. 24, 1928

This cause coming regularly on for trial, a jury being waived by agreement of counsel, trial being had by the Court and by reason of the law and the evidence being in favor of the defendant and against the plaintiff.

It is hereby ordered, adjudged and decreed that there be judgment against the plaintiff, Florsheim Brothers Dry Goods Co., Inc., and in favor of the defendant, United States of America, rejecting the demands of plaintiff at its costs.

Thus done, read and signed in open Court on this the 24 day of February, 1928.

Ben C. Dawkins, Judge.

In United States District Court

Plaintiff's Bill of Exceptions and Order Settling Same—Filed Feb. 24, 1928

Be it remembered that this cause, having been regularly assigned for trial, was called for trial before Hon. Ben C. Dawkins, Judge of said Court on the 10th day of November,

1927, both parties plaintiff and defendant announced ready for trial.

Whereupon counsel for plaintiff and for defendant filed in open Court their written stipulation that the case be tried by the Court without a jury in accordance with provi- [fol. 31] sions of Section 649 of the United States Revised Statutes, said stipulation being filed as part of the record in this cause.

Trial being proceeded with under said stipulation, counsel for plaintiff offered in evidence the petition filed by it together with the admissions made in the answer of the Government as respects the allegations of the petition.

Counsel for plaintiff then offered in evidence the tax return of the plaintiff filed March 15, 1918 with leave to substitute photostatic copy thereof, which document was admitted and filed in evidence as plaintiff's Exhibit 1.

Counsel for plaintiff then offered in evidence the second tax return of plaintiff received and filed in the office of the Collector June 16, 1918, with leave to substitute photostatic copy thereof, which document was admitted and filed in evidence as plaintiff's Exhibit 2.

Counsel for plaintiff then filed in evidence waiver of date March 1, 1925 with leave to substitute photostatic copy thereof, which document was admitted and filed in evidence as plaintiff's exhibit 3.

Counsel for plaintiff then offered in evidence notice from the Treasury Department at Washington of date June 10, 1925 with statement attached, which documents were filed in evidence as plaintiff's exhibit 4.

Counsel for plaintiff then offered in evidence demand for payment of tax of date June 18, 1925 with envelope attached, which documents were admitted and filed in evidence as plaintiff's exhibit 5.

Counsel for plaintiff then offered in evidence claim for refund filed with the proper board of date March 3, 1926, with leave to substitute photostatic copy thereof, which document was admitted and filed in evidence as plaintiff's exhibit 6.

[fol. 32] It was stipulated by agreement of counsel that payments of tax were transmitted by the plaintiff to the Government as dates alleged in the petition and received by the Government as of dates set forth in the answer; payments having been made under protest, which protest was based on the claim of plaintiff that the statutes of limita-

tion had run against the collection of the tax and were made under threat and in order to prevent execution of threat by the Tax Collector that petitioner's property would be seized and sold to satisfy the tax if not paid.

It was further stipulated by agreement of counsel that no other waiver was executed except that filed in evidence and marked plaintiff's Exhibit 3.

Counsel for the government offered no evidence, all the evidence offered in the case being that offered by the plaintiff, and the stipulations as hereinabove set forth.

At the conclusion of the trial and before submission of the case, counsel for plaintiff filed in Open Court written motion for directed verdict and judgment in favor of the plaintiff as prayed for in the petition, making all of the record and all of the evidence part of the motion, on the ground that the evidence proves conclusively plaintiff's right of recovery and that there is no substantial evidence in the record upon which a denial of its claim could be based, which motion was then and there by the Court referred to the merits to be considered by the Court as part of the record in the case.

The case was thereupon submitted upon the briefs to be filed, and the case taken under advisement.

In con-ection with, and as part of the brief filed by counsel for plaintiff, it was prayed that the Court make certain findings of fact to-wit:

[fol. 33] 1. That there is no proof in the record that a proper and legal assessment was made within the statutory period as extended by the agreement or waiver, and therefore the case is governed by Section 277 of the Revenue Act of 1924 and 1926 if either of these acts are held to apply in this case and the Government had no right to collect the tax at the time it was demanded and its payment enforced.

2. That the Court find that the agreement entered into between the Government and plaintiff fixed the period of time within which the tax for 1918 should be determined, assessed and collected not later than June 15, 1925; that such agreement became the law governing the collection of said tax as between the parties, exclusive of any subsequent act of Congress in derogation of plaintiff's rights fixed under said agrement; that the tax was not assessed and collected within said period and that at the time the tax was

demanded and paid the Government had no legal right to collect the same and it should be refunded.

3. That the Court find that Section 278 of the Revenue Act of 1924 does not apply to this case for the reason that said Act was not retroactive in effect; that no assessment was actually made within the statutory period (even accepting the theory of the Government that an assessment was made prior to June 16, 1925) which statutory period referred to in said Act referred to the period fixed by the statute and not to that fixed by convention, which contemplated and included the actual collection of the tax as well as its assessments within a stipulated period; and lastly, for the reason that this Section of the Act of 1924 had been amended by the Act of 1926 prior to the filing of this suit, which last named Act specifically declared its retroactivity.

[fol. 34] 4. That the Government had no right to collect the tax in question at the time its demand was made and enforced against the plaintiff, under the Revenue Act of 1926, if it is held to govern this case, for the reason that paragraph (d) of Section 278 of said Statute expressly holds, even in cases where the assessment has been made within the statutory period, that the collection of the tax cannot be enforced unless the proceedings are begun prior to the expiration of the period of collection agreed upon in writing by the Commissioner and taxpayer, which period in this case was fixed by such written agreement as on or before June 16, 1925, and accordingly the payment of the tax was illegally enforced subsequent to that date and should be refunded.

Thereafter on February 6, 1928, the Court handed down written opinion which is made part of the record in this cause, denying the contentions of the plaintiff, refusing to find the facts and law as requested in the motion and overruling the motion to direct verdict and judgment and ordering an entry of a decree rejecting plaintiff's demands.

To each of which rulings of the Court plaintiff timely excepted and reserved its bill of exceptions which is hereby settled and allowed on this February 24, 1928.

Ben C. Dawkins, United States District Judge.

Approved: —— ——, United States District Attorney.

[fol. 35] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ASSIGNMENT OF ERRORS—Filed Feb. 24, 1928

In the above numbered and entitled cause, comes now the plaintiff and respectfully shows that this Honorable Court has committed error herein to its prejudice in rejecting its demands and assigns as specification of such error that the Court erred in the following particulars:

1. In overruling the motion of plaintiff for the entry of judgment in its favor upon all of the evidence.

2. In finding that the evidence establishes that there was a legal assessment made prior to June 16, 1925, or at all, there being no evidence whatever in the record showing that the alleged assessment was actually made by the party in the form and manner prescribed by law.

3. In holding that the agreement or waiver was not the whole law governing the parties thereto with respect to the collection as well as assessment of taxes and holding that the agreement was made both with respect to the law as it then existed, and to the power of Congress to change it, thus giving the subsequent Act of Congress the effect of abrogating the rights of plaintiff established by contact between it and a duly authorized representative of the Government.

4. In holding that paragraph (d) of Section 278 of the Revenue Act of 1926 providing for the collection of taxes only if commenced prior to the expiration of any period for collection agreed upon by the Commissioner and taxpayer, did not bar collection in the case in question.

[fol. 36] Wherefore plaintiff prays that the judgment and decree herein be reversed.

Wise, Randolph, Rendall & Freyer, Attys. for Pltff.

IN UNITED STATES DISTRICT COURT

MOTION AND ORDER FOR APPEAL—Filed Feb. 24, 1928

In the above numbered and entitled cause now comes the plaintiff Florsheim Brothers Drygoods Company, Ltd., and

avers that the opinion and decree rendered herein, handed down and signed, are erroneous to the prejudice of appearer for the reasons set out in the assignment of errors hereinbefore filed, and appearer prays for an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and asks that the amount of the bond be fixed by the Court.

Further prays that on appeal that the judgment and decree herein be reversed, and for all other orders and decrees necessary for general relief.

Wise, Randolph, Rendall & Freyer, Attorneys for Plaintiff.

Order

The appeal herein is hereby granted and the bond is hereby fixed in the sum of $250.00 conditioned according to law.

Dated Shreveport, Louisiana, February 24, 1928.

Ben C. Dawkins, United States District Judge.

[fol. 37] Bond on Appeal for $250.00, approved and filed March 6, 1928, omitted in printing.

[fol. 38] In United States District Court

Note of Evidence—Filed Nov. 21, 1927

Note of evidence offered at the trial of the above numbered and entitled case, before Honorable Ben C. Dawkins, Judge of said Court, at Shreveport, Louisiana, on November the 10th, 1927.

Appearances: A. B. Freyer, of the law firm of Wise, Randolph, Randall and Freyer, attorneys for plaintiff; Hon. Philip H. Mecom, United States Atty., Attorney for defendant.

Stipulation waiving jury filed.

[fol. 39] Mr. Freyer: The plaintiff offers in evidence first the petition and the admission made in the answer as respects the allegations of the petition.

Document filed in evidence as offered.

Plaintiff also offers in evidence the return of the plaintiff filed on March 15, 1918, with leave to substitute photostatic copy thereof, document being marked Plaintiff 1.

Document filed in evidence as Plaintiff 1.

Plaintiff also offers in evidence the second tax return of the plaintiff filed in the office of the Collector of New Orleans June the 16th, 1918, with leave to substitute photostatic copy, marked Plaintiff 2.

Document filed in evidence as Plaintiff 2.

Plaintiff also offers in evidence the instrument called "waiver," dated March the 1st, 1924, leave to substitute a photostatic copy, marked Plaintiff's Exhibit 3.

Document filed in evidence as marked.

Plaintiff also offers and files in evidence a notice from the Treasury Department at Washington, dated June the 10th, 1925, addressed to the plaintiff, signed by Deputy Commissioner, together with the statement attached thereto, both of which instruments will be marked Plaintiff's Exhibit 4.

Document filed in evidence as Plaintiff's exhibit 4.

Plaintiff also offers and files in evidence a demand for tax, dated June the 18th, 1925, with the envelope in which it was received, showing the mail stamp at New Orleans of date June the 18th, and marked Plaintiff's Exhibit 5.

Document filed in evidence as Plaintiff's Exhibit 5.

[fol. 40] Plaintiff also offers in evidence the claim for refund filed with the proper board, filed March the 3rd, 1926, with leave to substitute photostatic copy, marked Plaintiff's Exhibit 6.

Document filed in evidence as Plaintiff's Exhibit 6.

It is stipulated and agreed by counsel that the payments of the tax, principal and interest, were transmitted by the plaintiff to the government as of the date alleged in the petition and received in due course as shown by the dates stated in the answer of the government, payments having been made under protest, the protest being based on the

claim of the plaintiff that the statute of limitation had run against the collection of the tax, and under the threat and in order to prevent execution of the threat by the Tax Collector that petitioner's property would be seized and sold to satisfy said tax, if the tax had not been paid.

The plaintiff thereupon rested.

It is stipulated and agreed that no other waiver was executed except that which has been heretofore offered.

The United States Attorney announcing that he had no evidence to offer, the evidence was closed.

Motion for a directed verdict was then filed and the case submitted on briefs to be filed within two weeks.

[fol. 41] Certificate to foregoing paper omitted in printing.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTES OF THE COURT

June 21, 1927.

Upon motion of the United States Attorney,

It was ordered that this case be fixed for trial Tuesday, November 1st, 1927.

It was ordered that Court adjourn until tomorrow morning at ten o'clock.

[fol. 42] [Title omitted]

Stipulation waiving jury filed, Whereupon this case came on for trial before the Court, the plaintiff being represented by its attorney, Mr. A. B. Freyer, and the Government being represented by the United States Attorney. Documentary evidence on behalf of the plaintiff was filed, and the Government announced that it had no evidence. Whereupon motion for directed verdict was filed by the plaintiff, and the evidence being closed, the case was submitted on briefs to be filed within two weeks.

Ordered that Court adjourn.

[Title omitted]

On motion of Mr. Philip H. Mecom, United States Attorney, counsel for the Defendant herein, Judgment in accordance with a previous opinion of the Court, handed down was read, signed and filed as now recorded in judgment record, Vol. 9 folio 467.

[fol. 43] On motion of Mr. A. B. Freyer, of counsel for the plaintiff herein Plaintiff's Bill of Exceptions was read, signed and filed. Counsel for Plaintiff then tendered and filed their assignment of errors; motion and order for appeal, and notice of appeal, and moved that service and citation of appeal be made upon the Hon. U. S. Attorney, for the Western District of Louisiana.

Ordered that Court adjourn.

In United States District Court

Præcipe for Transcript of Record—Filed Feb. 28, 1928

The Clerk will please proceed to make up the transcript in the above numbered and entitled cause, including therein the following:

1. Plaintiff's Petition;
2. Citation and return thereon;
3. Affidavit of Counsel for plaintiff that copy of petition was mailed by registered mail to the Attorney General of the United States at Washington;
4. Defendant's Answer;
5. Stipulation waiving jury;
6. Motion of plaintiff for directed verdict and judgment;
7. Special request for finding of law and fact attached to plaintiff's brief;
8. Opinion of the District Judge;
9. Final Decree;

[fol. 44] 10. Bill of exceptions together with documentary evidence offered by the plaintiff, being Plaintiff's Exhibit-Nos. 1 to 6 inclusive;

11. Plaintiff's assignment of errors;
12. Plaintiff's petition for appeal and order allowing same and fixing bond;

13. Plaintiff's notice of appeal and return showing service thereof;
14. Bond of appeal with approval thereon;
15. Citation of appeal and return showing service thereon;
16. Stipulation to transmit certain exhibit in original;
17. Stipulation and agreements of counsel as contained in stenographer's note of evidence;
18. This præcipe, and
19. Certificate of Clerk.

Wise, Randolph, Rendall & Freyer, Attys. for Plaintiff.

I hereby certify that a true copy of the foregoing præcipe was this day mailed to Philip H. Mecom, Esq., United States Attorney, the attorney for the defendant, Post Office Building, Shreveport, Louisiana.

Shreveport, Louisiana, February 27th, 1928.

A. B. Freyer, of Counsel for Plaintiff.

(Here follow exhibits, side folios 44-1 to 44-14, inc.)

[fol. 45] EXHIBIT P-3

United States of America, Treasury Department

November 23, 1926.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of Income and Profits Tax Waiver for 1918, dated March 1, 1924, filed by Seymore L. Florsheim, Pres., Florsheim Bros. Dry Goods Company, Ltd., Shreveport, Louisiana, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury.

(Signed) F. A. Birgfeld, Chief Clerk. HRS. (Seal.)

N. K. F. A. W. G. Bo CFH. M.

P 1
82

United States of America.

Treasury Department,

NOV 10 1927

November 23, 1926

Pursuant to Section 882 of the Revised Statutes I hereby certify that the annexed are true copies of Corporation Income and Profits Tax Return for 1918 (with schedules attached, minus balance sheets mentioned therein), executed June 14, 1919, filed by The Flersheim Bros. Dry Goods Company, Ltd., Shreveport, Louisiana; "Tentative" Corporation Income and Profits Taxes Return for 1918, filed by The Flersheim Bros. Dry Goods Company, Ltd., on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury

Assistant Secretary of the Treasury

1212-1

-NT-3/1948-

Page 1—SUMMARY

Form 1120—UNITED STATES INTERNAL REVENUE SERVICE

CORPORATION INCOME AND PROFITS TAX RETURN

FOR CALENDAR YEAR 1918

or

Fiscal Period begun _____, and ended _____, 1918

4173

(Print plainly corporation's name and principal place of business)

CARL

AUDITED

1282-16 return

CLOSED

QUALITY

TAX LIABILITY REDUCED

BASIS IF A

CLAIM

NUMBER

LIST

SCHEDULE I—NET INCOME.

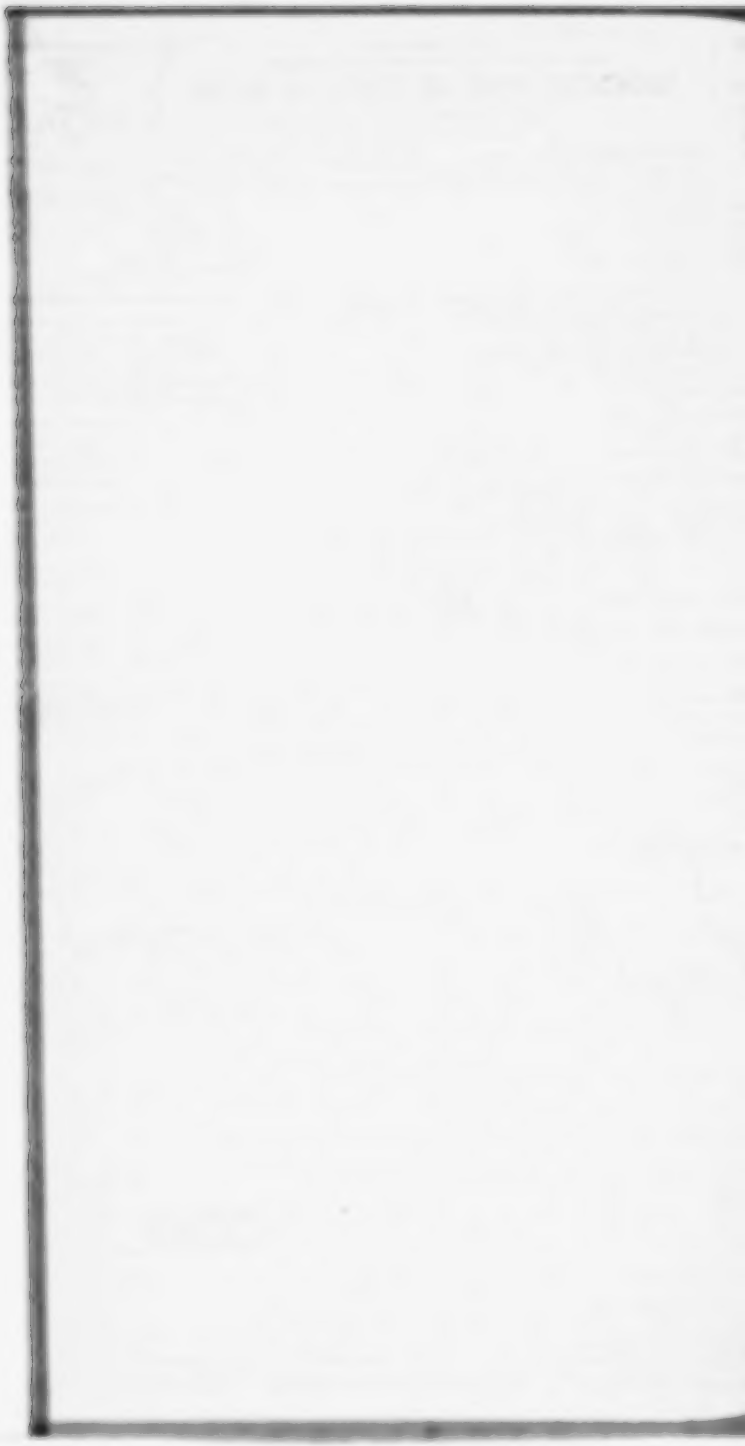
SCHEDULE II. INVESTED CAPITAL.

SCHEDULE III—EXCESS-PROFITS AND WAR-PROFITS CREDITS.

SCHEDULE IV. COMPUTATION OF TAXES.

INCOME TAX.

ADJUSTMENT OF TAX FOR FISCAL YEAR ENDED IN 1918.



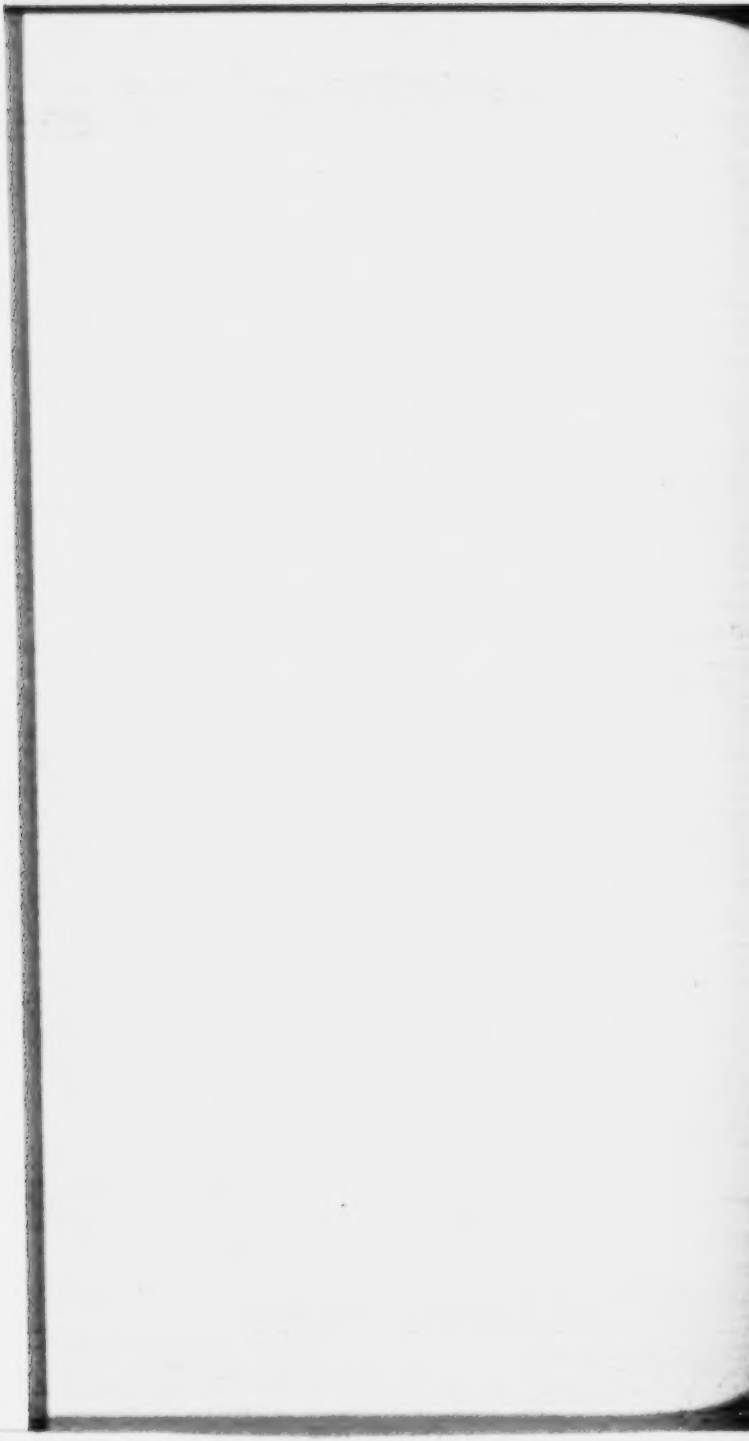
Page 3 – Income Statistics

SCHEDULE A – TAXABLE NET INCOME

SCHEDULE B – RECONCILIATION OF NET PROFIT PER BOOKS WITH TAXABLE NET INCOME

SCHEDULE C – BALANCE SHEETS

SCHEDULE D – ANALYSIS OF SURPLUS ACCOUNT



SCHEDULES SUPPORTING SCHEDULE A

6275494

The schedules called for below should be prepared and firmly stapled to this return. Designate each schedule with the number of the item in Schedule A which it explains. Make schedules on paper of uniform size as far as practicable. In the space provided for the purpose on page 6 list all schedules attached to this return, giving the title and schedule number of each.

SCHEDULE A2: COST OF GOODS SOLD, EXCLUSIVE OF EXPENSES, REPAIRS, AND OTHER ITEMS CALLED FOR SEPARATELY.

In support of Item 2, Schedule A, corporations engaged in manufacturing or trading must in all cases submit an analysis, in reasonable detail, of the cost of goods sold. This account should ordinarily include the following items but should not include any items now called for separately in Schedule A:

1. Inventory at beginning of period (to be reconciled with balance sheet).
2. Purchases during period.
3. Labor and wages ordinarily charged to manufacturing cost on the corporation's books, showing the principal items separately.
4. Other expenses ordinarily charged to manufacturing cost on the corporation's books. (State separately large or unusual items.)
5. Total.

Deduct:

6. Inventories at close of period (to be reconciled with balance sheet).
7. Cost of goods sold. (Item 5 less Item 6.)

Note.—Inventories should be valued at (a) cost or (b) cost or market, whichever is low, provided, however, that whichever basis was adopted by a taxpayer for the year to year 1917 must be consistently adhered upon application to the Commissioner consent is granted to change. If basis (b) is used it must be applied to each item in an inventory and not to a part only. An inventory should be recorded in a legible manner, properly computed and summarized, and should be preserved as a part of the accounting records of the taxpayer. (See Articles 1581 to 1585 of Regulations No. 45.)

Has any basis of the above-mentioned basis for valuing inventories is used in this return? Market Value

SCHEDULE A3: GROSS INCOME FROM OPERATIONS OTHER THAN TRADING OR MANUFACTURING, LESS ALLOWANCES.

Submit a schedule showing the nature and amount of the principal items included in Item 3, Schedule A.

Life insurance companies should enter on Item 3, Schedule A, the total premiums and policy dividends less such portion thereof as has been paid back or credited to, or retained as an investment of premiums of, such policyholders within the taxable year. (See Articles 448 and 547 of Regulations 45.)

Mutual marine insurance companies should report on Item 3, Schedule A, the gross premiums earned and received by them less amounts paid for reinsurance.

SCHEDULE A4: INTEREST ON OBLIGATIONS OF UNITED STATES OR ITS POSSESSIONS NOT EXEMPT.

Enter in table below the maximum amount of Liberty Bonds and other obligations of the United States owned since September 24, 1917 (par value) held at any one time, from this account was derived during the taxable year:

1. Name of issue	2. Number or amount owned	3. Number of days owned
(a) First Liberty Loan converted bonds (not including Liberty Loan converted bonds owned January 1, 1917)		
(b) First Liberty Loan converted bonds owned January 1, 1917		
(c) First Liberty Loan converted bonds		
(d) First Liberty Loan		
(e) Other obligations (see Regulations 45, Art. 549)		

Note.—The exemption as to Items (a) and (b) maximum $45,000 is limited to one and one half times the amount of the bonds of the Fourth Liberty Loan originally subscribed for and still held. State that amount here $

In order to ascertain the amount to be entered on Item 4, Schedule A, refer first to the table above.

If the amount entered in column 2 of the table for any class of obligations exceeds the amount entered in the same class of obligations on which any part of the income entered in column 3), attach hereto a schedule showing separately for each class of obligation:

(a) Class of obligation.

(b) Number of days of each period during which the corporation's holdings of that class of obligation were entered into.

(c) Amount of each class of obligation held by the corporation during each such period.

(d) Amount by which the amount entered in column (c) exceeds the maximum exemption for that class of obligation.

(e) Rate of tax due.

(f) Interest derived from each amount of principal stated in column (d).

For the purpose of showing changes in holdings and applying the exemption, claims need not be taken jointly, but for the purpose of computing the taxable interest they must be entered separately.

Enter on Item 4, Schedule A, the total of column (f) for all classes of obligations.

Submit also a statement showing the amount of interest derived from bonds and other obligations of the United States and its possessions, exclusive of those described in the table above.

SCHEDULE A5: INTEREST FROM OTHER SOURCES.

Submit a schedule showing the source, nature, and amount of the principal items included herein, the minor items being grouped in one figure. The total of the schedule should be entered on Item 5, Schedule A.

The interest on foreign bonds submit a schedule showing (a) name of country; (b) kind of obligations (whether sovereign, state, municipal, or corporate obligations); (c) amount of principal; and (d) amount of interest.

SCHEDULE A6: DIVIDENDS ON STOCK OF FOREIGN CORPORATIONS.

Submit a schedule showing for each item of corporation: (a) country in which organized; (b) total par value of stock held, and (c) amount of dividends.

SCHEDULE A10: GROSS INCOME FROM ALL OTHER SOURCES EXCEPT DIVIDENDS not including any amount in respect of capital assets or miscellaneous considerations.

Submit a schedule showing the source, nature, and amount of the principal items included herein, the minor items being grouped in one figure. The total of the schedule should be entered on Item 10, Schedule A.

SCHEDULE A11: ORDINARY AND NECESSARY EXPENSES (except amounts allowable for separately in Schedule A and not including cost or value of [illegible] miscellaneous investments sold during taxable year).

Submit a schedule showing the nature and amount of the principal items included

Insurance companies should state separately in Schedule A11 (a) the net amount required by law to be made within the taxable year to reserve funds (including in the case of assessment insurance companies the actual deposit of same with State or Territorial officers pursuant to law or additions to guarantee or reserve funds; and (b) the total of sums other than dividends paid within the year on policy and annuity contracts.

Corporations issuing policies covering life, health, and accident insurance combined in one policy issued on the monthly premium payment plan continuing for life and not subject to cancellation should report in Schedule A12 such part of the net addition (as required by law) made within the taxable year to reserve funds as is required for the protection of the holders of such policies.

Mutual marine insurance companies should report in Schedule A11 amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment and the payment thereof.

Mutual insurance companies (other than mutual life and mutual marine insurance companies) that require their members to make premium deposits to provide for loss and expense should report in Schedule A11 the amount of premium deposits returned to those policyholders and the amount of premium deposits retained for the payment of losses, expenses, and reinsurance reserves (unless deducted elsewhere in Schedule A).

SCHEDULE A12: COMPENSATION OF OFFICERS.

Submit a schedule showing for each officer (1) name, (2) duties, (3) time devoted to such duties, (4) shares of stock owned, (5) total annual compensation for the years 1916, 1917, and 1918, and (6) amount for increase.

SCHEDULE A14: REPAIRS (including labor, supplies, overhead, and other items properly chargeable to repairs).

Submit a schedule showing the nature and amount of the principal items included in Item 14, Schedule A.

Incidental repairs, which do not add to the value or appreciably prolong the life of property, are deductible as expenses. Expenditures for new buildings or for permanent improvements or betterments which increase the value of the property are chargeable to capital account. Expenditures for restoring or replacing property are not deductible under this or any other item of the return. Such expenditures are chargeable to capital account or to depreciation reserves, depending on the treatment of depreciation on the books of the taxpayer.

SCHEDULE A15: EXHAUSTION, WEAR AND TEAR (including obsolescence).

Submit a voluntary schedule containing, in the most practicable form, substantially the following information:

1. A classification of depreciable assets subdivided on the basis of (a) character, (b) term of useful life.
2. The fair market value of such assets March 1, 1913, if acquired before that date.
3. The cost of such assets if acquired after February 28, 1913.
4. The estimated life or term of reasonable usefulness of such assets from date acquired or from March 1, 1913, as the case requires. Give reasons for your conclusions.
5. For each class of assets—
   (a) The total amount of depreciation from March 1, 1913, to the beginning of the taxable year.
   (b) The total amount of depreciation (exhaustion, wear and tear, including obsolescence) claimed for the taxable year.
6. A reconciliation of all figures shown in this schedule with corresponding figures reflected in the balance sheets.

SCHEDULE A19: AMORTIZATION OF WAR FACILITIES.

If amortization is to facilitate is claimed the taxpayer is required to submit with this return the certificates and schedules called for in Articles 141 to 147 of Regulations 45.

SCHEDULES A23 and A24: PROFIT OR LOSS ON SALES OF CAPITAL ASSETS and miscellaneous transactions, and losses sustained during the taxable year from fire, storms, or other casualty, or from theft, not compensated for by insurance or otherwise.

Submit a schedule or schedules setting forth for each sale of capital assets or miscellaneous transaction and for each loss during the taxable year the information required below:

1. Description of property sold or of property in respect of which a loss is claimed.
2. Date acquired.
3. Fair market price or value on March 1, 1913, if acquired before that date, or cost if acquired after February 28, 1913.
4. Cost of improvements, if any, since February 28, 1913, or since date of acquisition, if acquired after February 28, 1913.
5. Total of Items 3 and 4.

Less—

6. Depreciation or depletion of property subject thereto—
   (a) Per books.
   (b) Accrued but not on books.
7. Salvage value, if any, of property on which a loss is claimed.
8. Amount of insurance or other recovery on property, if any.
9. Proceeds of sale or cash value of property received in exchange (for transactions falling in Item 23, Schedule A) (see Note).
10. Total of Items 6 to 9, inclusive.
11. Profit or loss.
12. Carried to [illegible] for losses falling in Item 24, Schedule A).

Note.—Submit such data as is necessary in arriving at the cash value of property received in exchange for other property.

COMPENSATION AT RATE OF $5,000 OR MORE PER ANNUM.

Submit a schedule showing for each employee (if a shareholder of the corporation), whose compensation is at the rate of $5,000 or more per annum, facts similar to those called for in Schedule A12.

WORKING PAPERS.

Every corporation should preserve, available for inspection by a revenue officer, working papers showing—

1. The balance in each account on the corporation's books that was used in preparing Schedule A.
2. The amount subjected to or in each such balance on account of each class of nontaxable income, allowable deductions, and other adjustments indicated on Schedule B, with a reference to the number of the item in Schedule B in which such amount or deduction was included.
3. The [illegible] such balances, and to show the amount included in [illegible] Schedule A, with a reference to the number of the item in Schedule A

SCHEDULE E—CAPITAL, SURPLUS, AND UNDIVIDED PROFITS AS SHOWN BY BOOKS BEFORE ANY ADJUSTMENTS ARE MADE THEREIN.

36. Par stock outstanding at the end of the preceding taxable year should be shown in the schedule to the extent that it is paid up. If stock or shares were issued at a par value or without par value, the amount should reflect the amounts on the books that were entered at the close of the preceding taxable year.

The term should include paid in surplus per books at the end of the preceding year. If any amount is claimed under Section 326(a)(2) of the Revenue Act of 1918 or Article 849 of Regulations 45 the amount claimed should be entered under Item 1, page 5, and not in this schedule.

37. Reserves which represent accumulated earnings and were not accumulated through deductions made in computing net income as returned in previous years may, if properly explained, be entered on line 7. Such entries should be identified and if necessary reconciled with balance-sheet reserves.

38. The cost (or book value if different from cost) of treasury stock held at the end of the preceding taxable year should be deducted on line 9 of the par value of such stock is included in the amount entered on line 4. Treasury stock includes all stock reacquired by the corporation and not cancelled, regardless of the method of the acquisition.

Items	1917	1918	1919	Taxable Year
1. Par stock paid up and actually outstanding at the close of the taxable year				
2. Preferred				
3. Second preferred				
4. Common	150 000 00	150 000 00	150 000 00	150 000 00
5. Total	150 000 00	150 000 00	150 000 00	150 000 00
Undivided profits:				
6. Paid in surplus				
7. Earned surplus and undivided profits	182 954 76	169 905 81	123 630 49	125 882 43
8. Reserves, minimum to which are not deductible in computing net income (to be reconciled with balance-sheet items)				
9. Gross assets or Items 4, 5, 6, and 7	332 954 76	319 905 81	273 630 49	275 882 43
10. Deduct cost (treasury stock (or book value if different from cost), if any is included above or outstanding				
11. Net worth (Item 9 minus Item 10)	332 954 76	319 905 81	273 630 49	275 882 43

SCHEDULE F—ADJUSTMENTS BY WAY OF ADDITIONS.

F1. If an addition to invested capital is claimed in Item 1, Schedule F, submit a statement showing (a) the kind of property, (b) the year in which it was paid in, (c) from whom paid, explaining his relationship to the corporation, (d) the actual cash value of such property at the date when paid in, (e) the par value of stock or shares issued therefor and the amount at which such property is entered in the accounts, and (f) the basis upon which the cash value of the property was determined and the date when such determination was made.

F2. If an addition to invested capital is claimed in Item 2, Schedule F, submit a statement showing (a) the kind of property, (b) the year in which it was acquired, (c) its cost, (d) the amount of depreciation sustained on such property from the date of acquisition to the beginning of the taxable year. State also whether such item ought to be restored wholly and or untile at the beginning of the taxable year. Were these expenditures, when made, written off in lieu of depreciation? ——. If so, explain what adjustments have been made to provide for depreciation, in view of the proposed restoration to surplus.

F3. If any addition to invested capital is claimed in Item 3, Schedule F, state specifically the amount of depreciation written off each year in the books of the company, and the amount allowed as a deduction in computing net income.

F4. If any assets of the trade or business in existence during both the taxable year and any previous year are included in the invested capital for the taxable year but not for such previous year, or are valued on a different basis in computing the invested capital for the taxable year and such previous year, entries should be made in the schedule adjusting the invested capital for each previous year affected so as to value such assets upon the same basis in the previous period as in the taxable year.

Items	1917	1918	1919	Taxable Year
1. Net value of tangible property (clearly and substantially in excess of par or stated value) paid for stock or other consideration paid in connection therewith (Art. 326)				
2. Additions to surplus (Articles 840 to 842)				
3. Deductions charged to the accounts of the corporation but not allowable as a deduction in income tax returns				
4. Amount of valuation of assets in existence both during taxable year and in previous period (Article 934)				
5. Total				

SCHEDULE G—ADJUSTMENTS BY WAY OF DEDUCTIONS.

1. Is any patent, copyright, secret process or formula, good will, trade-mark, trade brand, franchise, or other similar intangible property, paid in for stock, entered on the books of the corporation at a value in excess of its actual cash value when paid in? No

If so, what was the par value of the stock issued therefor? No. In the aggregate of such property prior to March 3, 1917? ——. In the case of such property acquired after March 3, 1917, entered on the books at a value in excess of 25 per cent of the par value of the stock outstanding at the beginning of the taxable year? No

If the answer to any of the foregoing questions is "yes," submit a statement showing fully with respect to such assets acquired (1) before March 3, 1917, and (2) on or after that date: (a) Date of acquisition; (b) cash value at that date, with a complete explanation of the basis upon which such cash value was determined; (c) par value of the stock issued therefor; (d) par value of total stock outstanding March 3, 1917; (e) par value of such stock outstanding at the beginning of the taxable year; (f) the value at which assets are entered on the books of the corporation.

If the intangibles were acquired before March 3, 1917, the amount by which (f) exceeds 25 per cent of (d), or 25 per cent of (c), whichever is lowest, must be restored as a dividend, if, for the taxable year and for each year of the present period that is affected.

If the intangibles were acquired on or after March 3, 1917, the amount by which the value (f) relating to such intangibles exceeds (b) or (c) relating thereto, or 25 per cent of whichever is lowest, must be included in Item 1, Schedule G, for the taxable year; and, if intangibles were acquired before March 3, 1917, and also on or after that date, provision shall be made on the basis of the amount included in invested capital for the aggregate intangibles shall not exceed 25 per cent of the par value of the total stock outstanding at the beginning of the taxable year.

2. If the stock of the corporation was issued at a nominal value or without par value for the purpose of the computation under Item 1 the par value shall be deemed to be the market value as of the date or dates of issue. The aggregate to value so determined must not exceed 25 per cent of the par value of the total stock outstanding on March 3, 1917, or at the beginning of the taxable year, shall be the limit to be allowed in the computation.

3. Is any tangible property, paid in for stock, entered on the books of the corporation at a value in excess of its actual cash value when received? No In excess of the par value of the stock paid therefor? No

If the answer to either of the foregoing questions is "yes," submit a statement showing (a) kind of property, (b) when acquired, (c) par value of the stock paid therefor; (d) actual cash value of the property when paid in; (e) the basis on which that value was determined; (f) the amount at which the property is entered on the corporation's books; and (g) account by which the excess of the allowable value under section 326 (a) (2) of the Revenue Act of 1918. Enter the amount as Item 2, Schedule G, for the taxable year and for each of the preceding period that is affected.

4. (a) Was any stock issued by the corporation now returned as a gift or for a consideration substantially less than its par value? No (b) If so, what was the total par value of such stock? $ —— (c) What was the consideration paid for the return of such stock? —— (d) What amount of cash or its equivalent was derived from the issue of such stock? —— (e) What entries were made in the accounts to evidence such issue?

The excess of (b) over (d) must be entered as Item 3, Schedule G, for the taxable year and for each year of the present period that is affected. However, no deduction is necessary if adequate adjustment has been made under Item F of this schedule.

C4. Was the business reorganized or consolidated or was its ownership changed or was there a change in ownership of property after March 3, 1917? No If so, answer the following questions:

(a) Did an interest of 50 per cent or more in the business or in the property, which changed ownership remain in the control of the same persons, corporations, associations, or partnerships, or of any of them? ——

(b) Were any of the assets entered on the books of the corporation making this return at a higher value than on the books of its predecessor? ——

(c) If such previous owner was not a corporation attach a statement showing (1) the cost of acquisition to the previous owner of any asset so transferred or received; (2) expenditures subsequent to that date for betterment or development, not deducted as an expense or otherwise since March 1, 1913, by such previous owner; (3) the allowance for depreciation, depletion, or impairment since the date of acquisition by such previous owner.

(d) If all, or substantially all, of the property was acquired from a corporation during the taxable year attach hereto balance sheets of such predecessor corporation as of the beginning of the taxable year and as of the date immediately prior to the transfer of the property to the corporation making this return, and also a balance sheet or statement of the corporation making this return showing the values at which such property received or transferred were entered on the books.

The increase in book value of any property acquired by reorganization, consolidation, or change of ownership, over the amount allowable to the predecessor corporation or over the amount as computed under (c) of the previous owner was not a corporation, must be deducted from the invested capital for the taxable year as Item 4, Schedule G.

C5. Is any property (including physical property, securities, and intangible property) paid for with cash or with other tangible property entered on the books of the corporation at a value in excess of the amount of cash paid therefor or the actual cash value of the tangible property paid therefor? —— If so, submit a statement showing (a) kind of property, (b) amount of cash paid therefor; (c) actual cash value of other tangible property paid therefor; (d) how that value was determined; (e) value at which the property is entered on the books of the corporation; and (f) excess of value over cash paid. This excess must be entered as Item 5, Schedule G, for the taxable year and for each year of the present period that is affected.

C6. Has adequate provision been made in the regular accounts of the company for (a) losses by fire? Yes; (b) depreciation? No; (c) obsolescence? No

(d) depletion of mineral deposits, timber supplies, and the like? ——

If adequate charge has not been made for depreciation, depletion, obsolescence, and other losses, and the value of the property has not been maintained by replacements that have been charged to expense, proper additional charges therefor must be computed for all years in which they were not made on the books, and the total amount of such charges must be entered as Item 6, Schedule G, for the taxable year (and for each year of the present period that was affected) and deducted in arriving at the corporate and undivided profits.

Page 8—Invested Capital Schedules—Continued

SCHEDULE I—ADJUSTMENTS BY WAY OF DEDUCTIONS (Concluded). 6275491

Item	1920	1921	1922	Taxable Year
Dividends declared (cash, stock, or property) out of earnings or profits for taxable year				
Amount of taxable property paid in for stock				
Interest on the expenditure on gift, etc.				
Taxes assessed in respect of income				
Other deductions				
Total deductions				
Net income (or deficit)	Sheriff's Officers—Marcus Hook Shipbuilding Co.	12610V 24	1410097 19	153419 -

SCHEDULE H—CHANGES IN INVESTED CAPITAL DURING TAXABLE YEAR.

Items to be entered: Capital during the taxable year ordinarily arises in one or more of the following ways:

1. Additions by reason of the sale of capital stock or the issue of capital stock for cash or other assets.
2. Liquidation of part of the capital by retirement of stock or purchase of treasury stock not out of current earnings.
3. Payment of cash dividends out of earnings of prior years.
4. Deduction of the amount of Federal income and excess profits taxes for the previous year.
5. Payment of assessments by stockholders, or creation of paid-in surplus by contribution of stockholders.
6. Sale of property for less than its value (as fixed by sales and bids for distribution, or otherwise) whether such loss is realized or is a deduction.
7. Dividends paid out of profits of prior years but not dividends paid out of earnings or profits of the taxable year. Any distribution made during the first 60 days of the taxable year is to be treated as having been made from earnings or profits accumulated during the taxable year, but any distribution made during the remainder of the taxable year shall be deemed to have been made from the profits for that year to the extent that such profits were sufficient. (See Article 1441.)
8. If stock is issued for cash, the actual cash received (but not the amount of the capital stock) should be entered in this column. Amounts (other than cash) paid in for stock must be valued in accordance with section 326 (a) (2) of the Revenue Act of 1918. (See Article 848.)
9. The amount of Federal income and excess profits taxes payable should be deducted as of the date when due and payable whether reserves have been set up on the books or not. (See Article 848.)
10. If capital stock of the corporation is recapitalized but not paid for out of current profits, the cost of such stock should be deducted from invested capital.
11. The date called for in column 1 (a) should be given for all transactions, except that columns 8 and 9 are applicable only to the issue or recapitalization of the corporation's stock.
12. In Column 6 enter the number of days remaining in the taxable year (including the date of change).
13. The net changes, if not in accordance with the increases or decreases reflected in the balance sheets, should be fully reconciled therewith.

1. Nature or Amounts and Transactions	2. Date.	3. Amount of Capital Paid in for Stock.	4. Paid-in Cash, Stock, Paid-in Surplus.	5. Amount of Cash or Cash Value Actually Received on Paid Ins.	6. Number of Days Outstanding.	7. Addition (Column 5 x Column 6 / Number of days in taxable year)
Dividend Paid	Jan 1 1918			1200000		

SCHEDULE J—CHANGES IN INVESTED CAPITAL DURING PREWAR YEARS.

(Compute the net addition or reduction separately for each year. See instructions under Schedule H.)

1. Nature or Amounts and Transactions	2. Date.	3. Amount of Capital Paid in for Stock.	4. Paid-in Cash, Stock, Paid-in Surplus.	5. Amount of Cash or Cash Value Actually Received on Paid Ins.	6. No. of Days Outstanding.	7. Addition (Column 5 x column 6 / Number of days in taxable year)
Dividend Paid	June 4 1920			2250000		
" "	June 1 1921			2250000		
" "	June 1 1922			2250000		

SCHEDULE K—CHANGES IN INVESTED CAPITAL FROM END OF PREWAR PERIOD TO BEGINNING OF TAXABLE YEAR, NOT SHOWN IN SCHEDULE H.

(See instructions under Schedule H, as far as applicable.)

1. Nature or Amounts and Transactions	2. Date.	3. Amount of Capital Paid in for Stock.	4. Paid-in Cash, Stock, Paid-in Surplus.	5. Amount of Cash or Cash Value Actually Received on Paid Ins.
Dividend Paid	June 1 1914			2250000
" Extra	June 24 1914			1500000
Int. on Loss "	June 30 1914			750000
Dividend Paid	Jan 1 1915			1243509
	Jan 1 1915			900000
	Jan 1, 1917			900000

SCHEDULE L—INADMISSIBLE ASSETS.

$ 6 2750 49 91

...the corporation any inadmissible assets (i. e., stocks, bonds, and other obligations on...

...obligations of the United States, the income for which is not taxable)? _____

...stock, furnish a statement showing for 1911, 1912, 1913, and the taxable year, ...the facts called for in Items (a) to (j) of this schedule.

...income from such assets or assets in part of gross or profit from the sale or other ...part, or all or part of the interest derived from such assets is in effect ...in the net income because of the limitation on the deduction of interest under ...(d) (2) of the Revenue Act of 1916, then a corresponding part of the capital ...such assets is deemed an admissible asset. In such case, set forth in detail ...The value of such of the inadmissible assets held by the corporation at the ...the capital invested therein which is deemed an admissible asset.

...purpose of this schedule, inadmissible assets shall be valued at cost of acquisi... part of the taxpayer has in prior years been allowed a deduction on account ...to the market value of securities, such assets shall be valued at cost less the deduc...

...Admissible assets shall be valued as provided in Sections 328, 329, and 331 ...Act of 1916 and Articles 931–936, 941–946, and 951 of Regulations 69. The ...amount of assets of each kind held during any year may ordinarily be determined ...ing by 2 the sum of the amount of such assets held at the beginning of the year ...and the amount held at the end of the year. In such case the amounts of admissible assets may best be determined from (1) the balance sheet as of the beginning of the year adjusted with respect to the items in Schedules F and G, and (2) the balance sheet as of the end of the year correspondingly adjusted. But if at any time during the year a substantial change has taken place in the amount of such assets, the average amount must be determined as provided in Article 932 of Regulations 69. In such case there should be entered—

(a) The computation and its amount.

State also—

(c) Amount of inadmissible assets held at beginning of the year.

(d) Amount of inadmissible assets held at end of year.

(e) Average amount of inadmissible assets held during year.

(f) Amount of admissible assets held at beginning of the year.

(g) Amount of admissible assets held at end of year.

(h) Average amount of admissible assets held during year.

(i) Sum of (e) plus (h).

(j) Percentage which (e) is of (i).

This percentage (j) for each year should be applied to the figures for that year appearing on line 7, Schedule H, in order to obtain the deduction on account of inadmissible assets which should be entered on line 8, Schedule H.

QUESTIONS.

KIND OF BUSINESS.

Explain below the nature of the corporation's business in sufficient detail to show ...the following general classes of its various activities:

(1) Agricultural and related industries, including fishing. (2) mining, quarrying, and ...extraction and related industries. (3) manufacturing. (4) construction. (5) trading. (6) transportation. (7) other services. (8) banking and insurance.

If the business falls in any of the classes from 1 to 8, state the special product or ...be handled; if in class 6, state whether wholesale or retail, or both. If in class 6, state ...rail, water, or other, whether general or local, and the special commodities (if ...the year. If in class 7, state the special commodities at end (if any) or the special ...year. If in class 8, state in detail the kind of service rendered; if in class 9, state ...kind of banking or insurance engaged in.

In all cases state whether the corporation is or is not principal (using its own capital) ...and broker (as commission) or as both.

This believe Wholesale Dry Goods

Notions & Furnishing Goods

Subsidiary businesses, if any _____

OTHER CONCERNS IN SAME BUSINESS.

Give on the following lines the names and addresses of five representative cor... same industry or branch of the country engaged in the same kind of business.

1. Leyfus Co Vicksburg La
2. Kuri Co Manroe La
3. Meyer Dry Goods Co. " "
4. Levenco Vicksburg Miss
5. New Albert Co Houston Texas

INCORPORATION.

Date of incorporation 1896 1890

Under the laws of what State or country Louisiana

PREDECESSOR BUSINESSES.

If the corporation was not in existence during the whole of any one of the calendar ...1911–1913, is its business substantially a continuation of a business carried on during ...name of those years? _____ If so, give name under which, and ...in which its business was then carried on _____

ACQUISITION OF MIXED AGGREGATES OF ASSETS.

Did the corporation ever take over a going business or otherwise acquire a mixed ...kind of assets (property, patents and copyrights, and good will and other similar ...rights property, and pay for such property in whole or in part with stock or other ...securities?

If so, submit a statement showing—

(a) The name of the concern taken over (or from which the property was ...acquired);

(b) The nature of the assets and liabilities so acquired,

(c) The total par value of the stock issued therefor,

(d) The value at which each class of assets was carried on the books of the concern ...from which acquired (if obtainable submit a balance sheet of the predecessor corporation as of the date of acquisition),

(e) The value at which each item was entered on the books of the corporation making this return.

If patents, copyrights, secret processes or formulæ, good will, trade-marks, trade ...franchises, or other intangible property were acquired, state also the basis on which value was determined and how they were paid for.

AFFILIATIONS WITH OTHER CORPORATIONS (TO BE ANSWERED BY EVERY CORPORATION).

11. Do you own directly or control through closely affiliated interests or by a working or majority ownership over 50 per cent of the outstanding capital stock of another corporation or of other corporations? No

12. Is over 50 per cent of your capital stock owned by another corporation or by two or more corporations that are affiliated? No

13. Is over 50 per cent of your capital stock as well as over 50 per cent of the capital stock of another corporation or of other corporations owned or controlled by the same individual or partnership or by the same individuals or partnerships? No

14. Is this return a consolidated return within the meaning of Article 631 to 636, inclusive, of Regulations 69? No

15. Affiliated corporations as indicated in 11, 12, or 13 above must comply with the following requirements:

16. If the answer to question 11 is "yes," submit a statement showing for each of the corporations over 50 per cent of whose stock is owned or controlled by you, either directly or through closely affiliated interests or by a majority or working ownership—

(a) The name and address,

(b) The total par value of the outstanding capital stock of the beginning of the taxable year, and the date and amount of each change thereto;

(c) The total par value of such outstanding capital stock owned or controlled by you at the beginning of the taxable year, or at the date of acquisition if acquired during the taxable year, and the date and amount of each change thereto.

17. If the answer to question 13 is "yes," state—

(a) The name and address of such corporation or corporations;

(b) The par value and percentage of your stock held by each.

18. If the answer to question 13 is "yes," submit a statement showing—

(a) The names and addresses of such corporations;

(b) The names or names and address of addresses of the owning or controlling interest or interests;

(c) The total par value of the outstanding capital stock of such corporation at the beginning of the taxable year, and the date and amount of each change thereto;

(d) The total par value of the outstanding capital stock of [redacted] or controlled by each one of the owning individuals at the beginning of the taxable year, and the date and amount of each change thereto.

19. If the answer to question 14 is "yes," attach the information furnished under 16 and 18 should identify the corporations to be included in the consolidation.

20. If one corporation owns 95 per cent or more of the stock of another, or if 95 per cent or more of the stock of two or more corporations is owned by the same individual or individuals in substantially the same proportion, a consolidated return must be filed, except that the limitations as to ownership contained in Article 632 must be observed. If the stock is less than 95 per cent, but exceeds 80 per cent, the Commissioner of Internal Revenue may permit the filing of a consolidated return. The percentage of ownership of any group of affiliated corporations must be shown by the information called for above and in addition there file a statement fully disclosing the details of relations other than stock ownership, and all other facts which will be helpful in determining whether or not a consolidated return should be filed.

VALUATION OF CAPITAL STOCK.

21. What was the fair value of the total capital stock of the corporation as determined in the last assessment of the capital stock tax (if any)? $ 275000.00 Date of this assessment Year ending June 30 1918

LIST OF ATTACHED SCHEDULES.

Make below a list of all schedules attached to this return, giving for each a brief title and the appropriate symbol.

No 1	Explaining	Items	2	Schedule	A
" 2	"	"	5	"	A
" 3	"	"	10	"	A
" 4	"	"	12	"	A
" 5	"	"	13	"	A
" 6	Inventory & Balance Sheet June 30 1918				
" 7	"	"	"	May 31 1917	
" 8	"	Analysis Surplus		1917	

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself and not one for the other, do depose and says that this return, including the accompanying schedules and statements, has been examined by him and is to the best of his knowledge and belief a true and complete return made in good faith pursuant to the Revenue Act of 1918 and the Regulations issued thereunder.

Sworn to and subscribed before me this 14th day of June, 1919.

A. A. Sedgers
Notary Public in and for La
(Official capacity.)

Seymour L. Flatau Jr.
President.

Louis L. Leubsdorf
Treasurer.

ESTABLISHED 1869

FORMERLY FLORSHEIM BROS. FURNISHING GOODS CO. FORMERLY FLORSHEIM, LOCKE & CO.

THE FLORSHEIM BROS. DRY GOODS CO. LTD

WHOLESALE

DRY GOODS NOTIONS AND FURNISHING GOODS

510 512 514 516 COMMERCE STREET

SHREVEPORT, LA.

NUMBER 1.

EXPLAINING ITEM 2, SCHEDULE A.

1.	Inventory JANUARY 1ST, 1918	$110.758.50
2.	Purchases 1918	731.627.01
3.	Home	
4.	Freight Paid 1918	14.302.00
5.	Total	856.687.51
6.	Inventory DECEMBER 31ST, 1918	257.941.79
7.	Cost of goods sold 1918	598,745.72

Inventory 9.000
Purchases
7.13

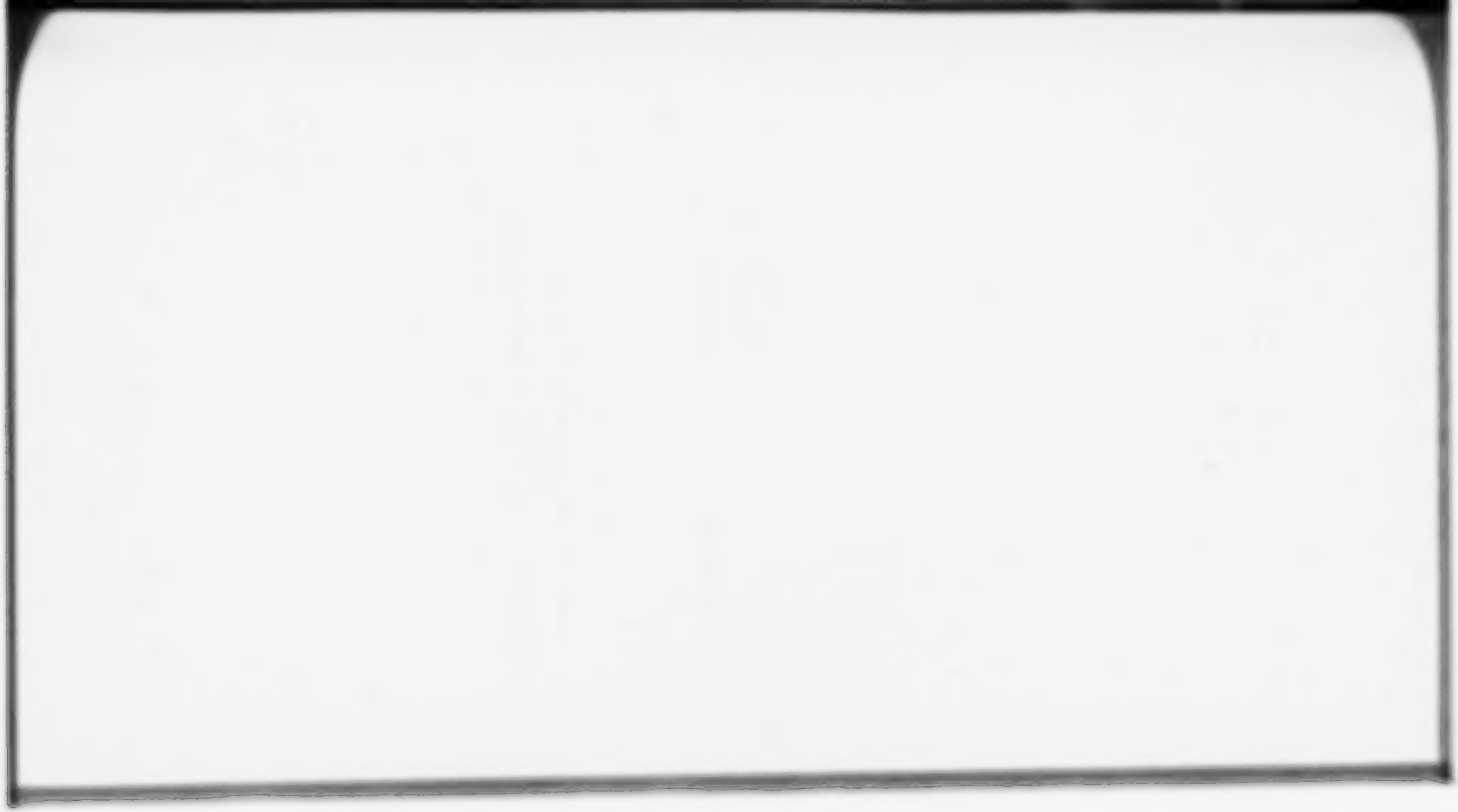
47

THE FLOURNOY BROS. DRY GOODS CO. LTD
WHOLESALE
DRY GOODS NOTIONS AND FURNISHING GOODS
SHREVEPORT, LA.

SCHEDULE E-

EXPLAINING ITEM 9, SCHEDULE A-

(a)	Interest from customers	$7,939.65
(b)	Discounts earned	2,741.14
	Total	$10,680.79



THE FLORSHEIM BROS. DRY GOODS CO. LTD.

WHOLESALE

DRY GOODS, NOTIONS AND FURNISHINGS GOODS

NORFOLK, VA.

NOTES B-

EXPLAINING ITEM 10, SCHEDULE A-

(a)	Bad debts previously charged off and recovered	$1,016.66
(b)	Insurance life of Mark Hess	2,000.00
	Total	$3,016.66

69

44-10

ESTABLISHED 1888

SEYMOUR L. FLORSHEIM, PRES'T. EDWARD H. FLORSHEIM, VICE PRES'T. LOUIS S. FLORSHEIM, SEC'Y & TREAS.

THE FLORSHEIM BROS. DRY GOODS CO., LTD.

WHOLESALE

DRY GOODS, NOTIONS AND FURNISHING GOODS

810 812 814 816 COMMERCE STREET

NEW YORK OFFICE 40 LEONARD ST.

SHREVEPORT, LA.

NUMBER 4-

EXPLAINING ITEM 12, SCHEDULE A-

(a)	Traveling salesmen's salaries	$10,650.00
(b)	House and office salaries	10,736.80
(c)	New York Buyer's salary	1,200.00
(d)	Traveling expenses	4,343.61
(e)	Rent	1,500.00
(f)	Insurance	5,516.89
(g)	Automobile repair and supplies	1,289.72
(h)	Stationery, printing and postage	1,083.51
(i)	Miscellaneous	4,636.70
	Total	$40,957.23

410

ESTABLISHED 1868

SEYMOUR L. FLORSHEIM PRES'T BERNARD H. FLORSHEIM V.PRES'T LOUIS S. FLORSHEIM SEC'Y-TREAS.

THE FLORSHEIM BROS. DRY GOODS CO., LTD.

WHOLESALE

DRY GOODS, NOTIONS AND FURNISHING GOODS

~~SIG~~ 514 BIG COMMERCE STREET

NEW YORK OFFICE 93 LEONARD ST

SHREVEPORT, LA.

NUMBER 5-

EXPLAINING ITEM 13, SCHEDULE A-

Name	Duties	Time	Shares	1916	1917.	1918
Henry Florsheim	President	All	248	6,000.00	10,000.00	
S.L. "	Secy-Treas.	"	10	3,600.00	6,000.00	
Louis S. "	Vice-Pres.	"	2	1,200.00	3,000.00	
E.H. "	Credit Man	"	2	2,400.00		
B.H. "	Director	"	2	900.00	2,400.00	
M.STRAUSS	Director	"	14		3,600.00	3,900.00
S.L. Florsheim	President	"	10			10,000.00
Louis S. "	Secy-Treas.	"	2			4,800.00
B.H. "	Vice-Pres.	"	2			2,400.00
Mrs.M.H. "	Director		250			6,000.00
				13,100.00	24,000.00	26,100.00

Increase in salaries of officers and directors of our company is due higher cost of living expenses, and increased duties to be performed account greater volume of business.

4-11

ESTABLISHED 1888

THE FLORSHEIM BROS. DRY GOODS CO., LTD.
WHOLESALE
DRY GOODS, NOTIONS AND FURNISHING GOODS
510 512 514 516 COMMERCE STREET
SHREVEPORT, LA.

NUMBER 8-

SCHEDULE D- ANALYSIS OF SURPLUS ACCOUNT.

1.	Surplus JAN.1ST,1918	125,882.43	
2.	Net Profit Schedule B, Item 1	94,990.92	
3.	None	None	220,873.35
Deduct-			
5.	JAN.2ND,1918 Dividend of 8% on $150,000 paid in cash	12,000.00	12,000.00
Surplus DEC.31ST,1918			$208,873.35

4-17

44-13

ORIGINAL

THIS FORM WITH DUPLICATE AND REMITTANCE COVERING ONE-FOURTH OF ESTIMATED TAX MUST REACH THE COLLECTOR'S OFFICE ON OR BEFORE MARCH 15, 1919.

Form 1031 UNITED STATES INTERNAL REVENUE SERVICE

TENTATIVE RETURN AND ESTIMATE OF CORPORATION INCOME AND PROFITS TAXES AND REQUEST FOR EXTENSION OF TIME FOR FILING RETURN

PRINT BELOW TAXPAYER'S NAME AND PRINCIPAL PLACE OF BUSINESS

62750404

Le Florshiem Bros Dry Goods Co Ltd
510 Commandery St
Shreveport La

To our order of the same
AMOUNT PAID
$15000.00
(Cashier's Signature)

Date Mch 10th 1919 (To be entered by taxpayer) No _____ (To be entered by Collector)

Collector of Internal Revenue,

New Orleans La

The amount stated below is remitted herewith in payment of not less than one-fourth of the estimated amount of the income, war profits, and excess-profits taxes for the year ended Dec. 31st 1918 of the corporation whose name and address appear at the head of this form

An extension of 45 days in the time allowed for filing a completed return is requested

It is not possible to file a completed return on or before March 15, 1919, for the following reasons

Unable to secure proper blanks and sufficient time since passage of act to properly inform ourselves

NOTE.—A parent company may make a tentative return and pay the first installment of the tax on behalf of all its subsidiaries without apportioning the tax among them until the completed return is filed.

Estimated amount of tax Sixty Thousand Dollars $ 60 000 00

Amount of remittance herewith:

Check or draft	Money order	Currency	Certificates of indebtedness	Total
$ 15000 00	$	$	$	$

AFFIDAVIT

The undersigned, president and treasurer, respectively, of the corporation whose name and address appear at the head of this form, being severally duly sworn, each for himself deposes and says that the foregoing is a fair estimate of the total amount of the income, war-profits, and excess-profits taxes of the said corporation for the period stated above, and that the above-stated reasons why a completed return can not be filed on or before March 15, 1919, are true.

Sworn to and subscribed before me this 10 day of Mch 1919

A B Grayer
Notary Public Caddo Parish La
(Official capacity)

Seymour L. Florsheim (President)

Louis L. Florsheim (Treasurer)

21

44-14

[fol. 46] Income and Profits Tax Waiver

Attach.
IT:CA:-2334-6. 1918.
Date: March 1, 1924. 371.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Florsheim Bros. Dry Goods Co. Ltd., of Shreveport, La., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits or war-profits taxes due under any return made by or on behalf of the said Florsheim Bros. Dry Goods for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waive-s already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

The Florsheim Bros. Dry Goods Co., Limited, Taxpayer, by Seymour L. Florsheim, Pres. D. H. Blair, Commissioner. (Seal.)

[fol. 47] If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Stamped: Received Mar. 4, 1924, Special Assessment Section.

Filed Nov. 10, 1927.

EXHIBIT P-4

Form NP-3

Treasury Department, Washington

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue, and refer to IT:E:SM. A-19896.

June 10, 1925.

Florsheim Brothers Dry Goods Company, Ltd., 510 Commerce Street, Shreveport, Louisiana.

SIRS: In accordance with the provisions of Section 274 (d) of the Revenue Act of 1924, there has been assessed against you an income and profits tax amounting to $11,282.15 for the taxable year 1918, the details of which are set forth in the attached statements.

[fol. 48] Under the provisions of Section 279 (a) of the Act you have the right to file with the Collector of Internal Revenue, within ten days after notice and demand for payment, a claim for abatement of this tax or any part thereof. The claim should have attached to it all evidence and data upon which you rely in support thereof, and should be accompanied by a bond not exceeding double the amount of the claim, with such sureties as the Collector deems necessary. When the claim is received by the Collector it will be transmitted to the Commissioner of Internal Revenue, Washington, D. C., who will notify you of the action taken.

Respectfully, J. G. Bright, Deputy Commissioner, by I. T. Enes, Chief of Section.

Enclosures: Statements.

Statement

P-4

IT:E:SM. IG-A19896.

In re Florsheim Bros. Dry Goods Co., Ltd., Shreveport, Louisiana.

Deficiency in Tax: Calendar year 1918, $11,282.15.

You are advised that after careful consideration and review, your application under the provisions of Section 327

for assessment of your profits tax as prescribed by Section [fol. 49] 328 of Revenue Act of 1918 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above mentioned provisions is as follows:

Profits tax, Section 328			$71,135 36
Net income, Bureau letter dated May 21, 1924		$132,648 81	
Less: Additional depreciation allowed on Furniture and Fixtures capitalized—10% of $1,000.00		100 00	
Corrected net income		$132,548 81	
Less: Profits tax	$71,135 36		
Exemption	2,000 00		
		73,135 36	
Balance taxable at 12%		$59,413 45	7,129 61
Total tax assessable			$78,264 97
Tax previously assessed: Account No. 41732			66,982 82
Additional tax			$11,282 15

Filed Nov. 10, 1927.

[fol. 50] Exhibit P-5

Form 7650—Revised July, 1924

Notice and Demand for Income Tax

United States Internal Revenue Service

Notice is hereby given that there has been assessed against you the amount stated hereon. Demand is hereby made for immediate payment of said tax. If payment is

not made within ten days after date of this notice, the Act provides that interest at the rate of 1 per cent per month will accrue from the due date.

Dated June 18, 1925.

Name and address: Plotnikoff Bros. Dry Goods Co., Ltd., Shreveport, La., 519 Commerce St.

Items: ——

June 60 C SPL, No. 4.

Date: ——,

Collector's paid stamp: ——.

To the Collector of Internal Revenue at New Orleans:

I enclose herewith the sum of $— in payment of the tax shown below.

Name: —— ——, Address: ——,

Total Assessment: 11,282.55.

Return this form with remittance.

Filed Nov. 10, 1927. W. B. Lee, Clerk U. S. Dist. Court, West. Dist. of Louisiana.

[Ed. 16] P-5

Penalty Envelope

Treasury Department, Office of Collector of Internal Revenue, New Orleans, La.

Return after Five days.

Stamped: New Orleans, La. Jun. 18, 3 P. M., 1925, La. 2970.

Filed Nov. 10, 1927.

Exhibit P-6

United States of America, Treasury Department

November 22, 1926.

Pursuant to Section 882 of the Revised Statutes I hereby certify that the annexed is a true copy of Claim for Refund of $11,282.55, Income Tax for 1918, filed by Plotnikoff Bros. Dry Goods Company, Ltd., Shreveport, Louisiana, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury.

F. A. Birgfeld, Chief Clerk. (Seal.)

NKF AWG HRS R.

Re Fb.

Filed Nov. 10, 1927.

Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S. January 18, 1922.

Annual 1919 No. 41732 and Com. Jun. 4, 1925. OOC Spl. [Ed. 32] F815 922302.

(Execute separate form for each period.)

Claim for

— Abatement of tax assessed

— Credit against outstanding assessments

x Refund of taxes illegally collected

— Refund of amounts paid for stamps used in error or excess

Notice to collector: Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit—Recorded Mch. 11, 1926, Claims Control Section. Stamp here.

Collector's Notation: District: ——. Account number: ——. Date received: Stamp here—Collector Int. Revenue Rec'd Mar. 2, 1926 Dist. of La. —— ——, Collector of Internal Revenue.

Important: File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

State of Louisiana,

Parish of Caddo, ss:

Type or print:

(Name of taxpayer or purchaser of stamps:) The Florsheim Bros. Dry Goods Co. Ltd., (Residence—give street and number as well as city or town and State:) 510-16 Commerce Street, Shreveport, Louisiana; (Business address:) —— ——,

[fol. 53] This depondent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period from Jan. 1, 1918, to Dec. 31, 1918.

1. Business in which engaged—Wholesale dry goods, notions, furnishings.

2. Character of assessment or tax—Corporation Income and Profits Tax. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased—$78,264.97.

4. Reduction of Tax Liability requested (Income and Profits Tax)—$11,282.15.

5. Amount to be abated—none.

6. Amount to be refunded (or such greater amount as is legally refundable)—$11,282.15.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): ——. (If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: ——.

9. District in which unpaid assessment appears: ——.

[fol. 54] 10. Amount of overpayment claimed as credit—none.

11. Unpaid assessment against which credits is asked; period from—none.

Rec'd Collector Internal Revenue, Dist. of Louisiana. Feb. 25, 1926.

Received March 5, 1926, Claims Control Section, La.

Deponent verily believes that this application should be allowed for the following reasons:

Tentative return was filed for year 1918, before March 15, 1919; on June 14, 1919, the complete return was mailed for 1918, (June 15, 1919 was on Sunday) Collector therefore received return on June 16, 1919. Five year statute of

Limitation prescribed by Section 277 of the Revenue Act of 1924 caused the time within which the Commissioner might make an assessment to expire on or before June 16, 1924; this however was extended to June 16, 1925, by taxpayer signing a waiver of the Statutes of Limitation. This was not further extended. Under date of June 10th, 1925, file reference, IT:ELSM: A-19896, the Commissioner advised taxpayer a deficiency in the sum of $11,282.15 was being immediately assessed. Notice and demand dated June 18, 1925, for the payment of $11,282.15 was mailed from New Orleans, La. on June 18, 1925, which taxpayer paid under protest after having been granted permission to extend payment thereof as provided by Section 270 of the Revenue Act of 1924. Taxpayer in application for this extension made its position clear that the correctness and legality of the tax was not being accepted, and was being paid only to avoid [fol. 55] distraint and seizure. It was at that time contended and is now here made the basis of this claim for refund that the tax was not legal, no proceedings for collection thereof having been begun before June 16, 1925, which was the last date within the legal time, therefore the tax has been illegally collected and should be refunded. In this position taxpayer cites the case of New York and Albany Literage Company vs. Bowers, Collector, decided by the United States District Court for the Southern District of New York on February 13, 1925 and on February 1, 1926, affirmed by the Circuit Court of Appeals for the Second Circuit.

(Attach additional sheets if necessary.)

(Signed) The Florsheim Bros. Dry Goods Co., Ltd.
Seymour L. Florsheim, Sec. and Treas.

Sworn to and subscribed before me this 24th day of Feby., 1926. A. B. Freyer, (Title:) Notary Public, Caddo Ph., La.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)
e-1 o2—11704.

[fol. 56] Clerk's certificate to foregoing transcript omitted in printing.

Citation of appeal filed in the office of the Clerk of the United States Circuit Court of Appeals.

* * * * * * *

[fol. 57] Minute entry of argument and submission December 12, 1928, omitted in printing.

[fol. 58] In United States Circuit Court of Appeals, Fifth Circuit

No. 5295

Florsheim Bros. Dry Goods Company, Ltd., Appellant,

versus

United States of America, Appellee

Appeal from the District Court of the United States for the Western District of Louisiana

Before Walker, Bryan, and Foster, Circuit Judges

Opinion—Filed December 19, 1928

Bryan, Circuit Judge:

This was a suit by appellant to recover back the amount of taxes which it paid under protest upon its income, war profits, and excess profits, for the year 1918.

It was based on the sole ground that the Government forced collection of the taxes after the running of the statute of limitations. The district court held that the taxes were collected within the period prescribed by law, and entered judgment dismission the suit.

[fol. 59] On March 15, 1919, appellant filed a tentative tax return for the year 1918, and received an extension of time for filing its completed return, which was made on June 14, 1919. In March 1, 1924, appellant and the Commissioner of Internal Revenue signed a written or printed instrument in the following form:

"In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Florsheim Bros. Dry Goods Co. Ltd., of Shreveport, La., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits or war-profits taxes due under any return made by or on behalf of the said Florsheim Bros. Dry Goods for the year 1918 under the Revenue Act of 1921, * * * This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waiver already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned."

The additional taxes here involved were assessed by the commissioner on June 11, 1925, and were paid under protest on dates later than June 14, 1925.

Under § 250(d) of the Revenue Act of 1921, it was required that taxes for prior years, including 1918, should be returned and assessed within five years "after the return was filed, unless both the Commissioner and the tax-payer consent in writing to a later determination, assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after [fol. 60] the expiration of five years after the date when such return was filed." As a final return was made on June 14, 1919, the statute of limitations, unaffected by the written consent, would have run on June 14, 1924. It is suggested in argument that the statutory period of limitations began to run from the date of the tentative return in March of 1919; but we are of opinion that the return meant by the statute was the final or completed return.

The consent in writing, entered into by appellant and the Commissioner, had the effect of extending the limitation of the statute for one year or until June 14, 1925. The Revenue Act of 1924, which became effective on June 2, 1924, by § 278(d) provides that a tax which had been assessed within the period prescribed by law could be collected by distraint or by a proceeding in court begun within six years after the assessment thereof. As the taxes here involved were assessed on June 11, 1925, they were assessed within the statutory period of five years as extended by the written

consent of appellant and the commissioner. In United States v. Crooks, 18 F. (2) 449, this court held that, if the statutory period of limitations had not expired at the time of the passage of the Revenue Act of 1924, and if the assessment of the tax had been timely made after its passage, the period for collection was extended for six years from the date of the assessment. A result of that decision is that the collection of taxes in the instant case was not barred by the statute of limitations. The consent in writing simply served to enlarge the period of limitations and otherwise to leave unchanged the provisions of law relating to collection as well as to determination and assessment of the taxes. The form adopted is in strict compliance with § 250(d) of [fol. 61] the Act of 1921, and it was not intended by that section to authorize an agreement by the commissioner to change the existing rights of the parties. Postponement of the period of limitation was all that was authorized by the law or attempted by the consent in writing. This case does not in anywise differ in principle from the case of United States v. Crooks, supra.

The judgment is affirmed.

[fol. 62] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 5295

FLORSHEIM BROS. DRY GOODS COMPANY, LTD.,

versus

UNITED STATES OF AMERICA

JUDGMENT—Dec. 19, 1928

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fols. 63-69] Petition for Rehearing, January 7, 1929, covering seven pages, omitted from this print. It was denied and nothing more by order March 1, 1929.

[fol. 70] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—Mar. 1, 1929

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 71] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] Supreme Court of the United States

Order Allowing Certiorari—Filed October 14, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,249. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 118. Florsheim Brothers Drygoods Company, Ltd., petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed May 31st, 1929. File No. 34,249.

FILE COPY

MAY 31 1929

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 940 116

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD., PETITIONER,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

E. H. RANDOLPH,
ALLEN RENDALL,
A. B. FREYER,
Counsel for Petitioner.

(34,249)

INDEX TO PETITION.

Subject Index.

	Page
Petition for writ of certiorari:	
Statement of the case	2
Summary statement of the matters involved	3
Specification of error	4
Grounds of application for this writ	5
Prayer for writ	6
Affidavit of Bernard H. Flumbotin	7

Table of Cases Cited.

Steel Rubber Company v. White, Collector, 20 Fed. (2d), 66	4
United States v. Crooks, 10 Fed. (2d), 469	3
United States v. Flumbotin, etc., 20 Fed. (2d), 646	3
20 Fed. (2d), 660	3

Table of Statutes.

Revenue Act of 1921, Sec. 250 (d), 42 Stat., 268	3
Revenue Act of 1924, Sec. 277 (a) (2)	3
Sec. 278 (a)	3
Sec. 279 (d)	3
Sec. 279 (e)	3
Revenue Act of 1926, Sec. 279 (d)	3
Revenue Act of 1928, Sec. 279 (d)	3

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 940

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD., Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Florsheim Brothers Drygoods Company, Ltd., respectfully petitions this Honorable Court to grant a writ of certiorari to the Honorable United States Circuit Court of Appeals, Fifth Circuit, and to remove therefrom to this Honorable Court for review the record in the case there lately pending entitled Florsheim Brothers Drygoods Company, Ltd., plaintiff and appellant, v. United States of America, defend-

ant and appellee, being case No. 5295 on the docket of that Court. A certified copy of the record therein is presented herewith.

Statement of the Case.

This action originated in the United States District Court for the Western District of Louisiana, Shreveport division, the jurisdiction of said Court being based on the fact that it was an action against the United States arising under an act of Congress, being for the recovery by this petitioner of $11,517.57 with interest, as income, war profits and excess profits taxes paid under protest for the year 1918.

The trial of the cause resulted in a judgment in favor of the defendant rejecting the plaintiff's demands, reported in 26 Fed. (2nd) 505. The case was taken by petitioner on appeal to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, which court, on December 19, 1928, rendered a decree affirming the judgment of the lower court (R. 60). On January 7, 1929, application for rehearing was duly filed (R. 61) and refused March 1, 1929 (R. 69) (29 Fed. (2nd) 895). Whereupon petitioner requested that the mandate be stayed until application for this writ of certiorari could be made.

Your petitioner respectfully represents that said Court of Appeals was in error in affirming the judgment of the lower court.

Summary Statement of the Matters Involved.

As stated by the Court of Appeals, on March 15, 1919, petitioner filed a tentative tax return for the

year 1918 and received extension of time for filing of its completed return, which was made on June 14, 1919. On March 1, 1924, petitioner and the Commissioner of Internal Revenue signed an instrument in form shown on page 46 of the record, consenting to a determination, assessment and collection of the amount of said tax due under return filed by petitioner for the year 1918 during a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year mentioned.

The additional taxes here involved were *claimed* to have been assessed on June 11, 1925, but the audit notation on the return (photostatic copy following page 44 of record), notice of the Treasury Department of assessment (R. 47-48) and the notice and demand for income tax (R. 50), which constitutes all of the evidence showing assessment, does not show that any assessment whatever was made by the Commissioner of Internal Revenue as required by law.

The taxes were paid under protest on dates later than June 14, 1925. Under Section 250 (*d*) of the Revenue Act of 1921 (42 Stat. 264) it was required that taxes for prior years should be returned and assessed within five years "after the return was filed unless the Commissioner and tax payer consent in writing to a later determination, assessment and collection, and no suit or proceeding for the collection of such tax * * * shall be begun after the expiration of five years after the date when such return was filed."

Contention was made below and is here urged that:

1. There is no proof whatsoever in the record that any legal assessment was made by the commissioner as required by law;

2. That the five year period of proscription began to run from the date of the tentative return in March, 1919;

3. That the "consent in writing" between the tax payer and the commissioner, authorized by Congress, was a mutual agreement by which the tax payer extended the time of the Government within which the taxes should be determined, assessed and collected and the Government, on its part, agreed that all three of these things should be done within that time, otherwise they would be proscribed.

Specifications of Error.

1. The Court erred in holding that "the additional taxes here involved were assessed on June 11, 1925, when there is not a scintilla of evidence in the record that the Commissioner himself ever made any assessment whatever as required by Section 3182 of the Revised Statutes of the United States.

2. The Court erred in holding that "the consent in writing (R. 46) simply served to enlarge the period of limitation and otherwise to leave unchanged the provisions of law relating to collection as well as to determination and assessment of the tax" and did not change the existing rights of the parties.

3. The Court erred in holding that the period of limitation for the assessment and collection of taxes began to run from the date of the filing of the completed return instead of from the date of the filing of the initial return.

4. The Court erred in holding that the case does not in any wise differ in principle from the case of United States *vs.* Crooks, 18 Fed. (2nd) 449.

5. The Court erred in refusing and failing to hold that the collection of the taxes involved was barred, at the time of its payment, under the provisions of Sec. 277 (*a*) (2), and 278 (*c*), (*d*) and (*e*) of the Revenue Act of 1924; Sec. 278 (*d*) of the Revenue Act of 1926 and Sec. 278 (*d*) of the Revenue Act of 1928.

Grounds of Application For This Writ.

Petitioner respectfully represents that important questions of Federal law are involved which have never been, but should be, settled by this Honorable Court; that they are of great public interest, affecting thousands of tax paying citizens and the Internal Revenue Department of the Government, involving millions of dollars of taxes; that in the District Court for the Eastern District of South Carolina Judge Ernest F. Cochran on March 30, 1929, in the case of Brandon Corporation *vs.* John F. Jones, Collector (unreported in the advance sheets) decided contrary to the decision of the Circuit Court in this case in holding that the period of limitation for the assessment and collection of taxes began to run from the date of filing of the

so-called tentative or initial return and not from the filing of the so-called final report; that in the District Court for the District of Massachusetts, on August 29, 1928, Judge Lowell, in the case of Hood Rubber Company *vs.* White, Collector (28 Fed. (2nd) 54), held contrary to the decree of the Court in this case and held that the collection of the tax was barred after the period stipulated in the consent or so-called waiver, thereby giving the effect to such consent as being a binding obligation on the Government as well as the tax payer (the last cited case now pending before the U. S. Circuit Court of Appeals for the First Circuit, bearing No. 2338 and having been argued before that Court April 15, 1929, but not yet decided).

Your petitioner respectfully represents that this writ should be granted in order that the important questions of federal law so presented may be determined by this Honorable Court so that the taxing department of the Government, the various courts in which cases are now pending, and the tax paying citizens, may have their rights finally settled and adjudicated.

WHEREFORE your petitioner prays that a writ of certiorari be issued under the seal of this Honorable Court directed to the said Circuit Court of Appeals for the Fifth Circuit sitting at New Orleans, Honorable Richard W. Walker, Nathan P. Bryan and Rufus E. Foster, Circuit Judges, commanding the said Court to certify and send to this Honorable Court on a day to be designated, a full and complete transcript of the record of proceedings of said Circuit Court of Appeals

had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and on final hearing that the said decree of the Honorable Circuit Court of Appeals be reversed by this Honorable Court, and for such other relief as may be proper, and for all of which your petitioner will ever pray.

E. H. RANDOLPH,
ALLEN RENDALL,
A. B. FREYER,
Counsel for Petitioner.

ALLEN RENDALL,
A. B. FREYER,
Of Counsel.

STATE OF LOUISIANA,
Parish of Caddo:

Before me, the undersigned authority, personally came and appeared Bernard H. Florsheim who being by me first duly sworn deposes and says that he is President of the Florsheim Brothers Drygoods Company, Ltd., that he has read the foregoing petition and the facts stated therein are true to the best of his information and belief.

BERNARD H. FLORSHEIM.

Sworn to and subscribed before me this May 25th, 1929.

[SEAL]

E. B. HERNDON
Notary Public Caddo Parish, La.

INDEX TO BRIEF.

Subject Index.

	Page
Brief in support of petition for writ of certiorari:	
First specification	1
Third specification	3
Fourth specification	6
Second and fifth specifications	6

Table of Cases Cited.

Brandon Corporation v. Jones, Collector of Internal Revenue (not yet reported)	3
C. & N. W. Ry. Co. v. United States, 104 U. S., 680; 26 L. Ed., 891	8
De Arnaud v. United States, 151 U. S., 483; 14 S. Ct., 374; 38 L. Ed., 244	8
Hood Rubber Company v. White, Collector, 28 Fed. (2d), 54	7
Lamborn et al., 13 B. T. A., 177	5
Matteawan Mfg. Co., 14 B. T. A., 789	5
United States v. Crooks, 18 Fed. (2d), 449	6

Statutes Cited.

Revenue Act. 1918, Section 250 (*d*)	2
Section 250 (*c*)	4
Revenue Act, 1924, Section 277 (*a*) (2)	6
Section 278 (*c*)	6
Section 278 (*d*)	6
Section 278 (*e*)	6
Revenue Act, 1926, Section 278 (*d*)	6
Revenue Act, 1928, Section 278 (*d*)	6
Revised Statutes, Section 3182	1, 2

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 940

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD., PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

We shall at this time content ourselves with a brief argument in connection with the specification of errors contained in the accompanying petition for writ.

> *First Specification:* "The Court erred in holding that 'the additional taxes here involved were assessed on June 11, 1925' when there is not a scintilla of evidence in the record that the Commissioner himself ever made any assessment whatever as required by Section 3182 of the Revised Statutes of the United States."

The only evidence whatever in this record tending in any manner to show an assessment as having been

made was contained at three places in the record. The notice of date June 10, 1925 (R. 47-8) addressed to petitioner advising it that an assessment of additional taxes had been made was signed J. G. Bright, Deputy Commissioner by I. T. Fluss, Chief of Section (R. 48). The "notice and demand for income tax" (R. 50) dated June 18, 1925, bears no signature whatever and certainly evidences no actual assessment made by the Commissioner himself. The audit notice on the return itself (photostatic copy on record sheet immediately following page 44 of record) shows that the same was audited by I. Graff.

Section 3182 of the Revised Statutes of the United States reads as follows:

> "Sec. 3182. The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this Title, or accruing under any former internal revenue act, where such taxes had not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified."

Section 250 (*d*) of the Revenue Act of 1918 likewise provides as follows:

> "Sec. 250 (*d*). Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or

> was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

It will thus be seen that the law requires that the assessment be made by the Commissioner himself and in the absence of any proof in the record that it was so made we feel that we are justified in charging no error the finding by the court that the additional taxes are "assessed by the Commissioner" on the date stated.

Specifications two and five will be discussed together later.

> *Specification Three:* "The Court erred in holding that the period of limitation for the assessment and collection of taxes began to run from the date of the filing of the completed return instead of from the date of the filing of the initial return."

In presenting memorandum in relation to this specification we beg leave of the Court to quote from the opinion of Judge Ernest F. Cochran in the case of Brandon Corporation vs. Jones, Collector of Internal Revenue, in the District Court of the United States for the Eastern District of South Carolina, No. L-207 (not yet reported in the advance sheets) which directly decided the matter presented by this specification contrary to the decision of the Court in the present case. In the opinion referred to Judge Cochran said:

"It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the Government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the Government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of February 13, 1919 and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns and it necessarily follows that the return which he then required, must be deemed the return contemplated by the statute whether termed merely a tentative return or not.

But the tentative return was sufficient to constitute a return in another aspect. Section 250 (*c*) of the same Act (40 Stats. 1083) provides that if any tax remains unpaid after it is due and for ten days after notice and demand, there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax; but the same section provided that in the case of the first instalment, the instructions printed on the return should be deemed sufficient notice of the date when the tax is due, and sufficient demand. Form 1031-T contained instructions complying therewith and was a sufficient notice and demand to make the first instalment payable in March 15, 1919.

Moreover, the Commissioner of Internal Revenue has always considered that assessments may be properly made on such tentative returns. For examples of assessments thus made, see Matteawan Mfg. Co. 14 B. T. A. 789, and Arthur H. Lamborn et al, 13 B. T. A. 177.

Again, form 1031-T contained an explicit statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must therefore be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose.

* * * * * * *

The law clearly contemplates, so far as the starting of the statute of limitation is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented *bona fide*, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The Government cannot blow hot and cold. It cannot say to the taxpayer, "file a paper which we know to be incomplete and does not give all the information required by law, and pay us the first instalment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed return," and then say later, that "the first paper which you filed was no return and the statute must start from the date of the final completed return." It cannot say, when its interests require it to do so, that the tentative return is a return and then when its interests require the contrary, say that it is no return."

> *Specification Four*: "The Court erred in holding that the case does not in any wise differ in principle from the case of United States *vs.* Crooks, 18 Fed. (2nd) 449."

From a reading of the Crooks case it will be noted that the taxes there involved were for the calendar year *1919* and under the Act of 1921 the statutory period therein provided within which to make the assessment had not elapsed before the enactment of the Act of 1924 and in the Crooks case there was no waiver or consent whatever involved, as in the case at bar. In the case at bar the tax involved was for the calendar year 1818 and the *statutory period* provided by the Act of 1921 had already elapsed before the enactment of the Act of 1924, which substantially and seriously distinguishes the case at bar from the Crooks case.

> *Specifications Two and Five*: "2. The Court erred in holding that 'the consent in writing (R. 46) simply served to enlarge the period of limitation and otherwise to leave unchanged the provisions of law relating to collection as well as to determination and assessment of the tax,' and did not change the existing rights of the parties."
>
> "5. The Court erred in refusing and failing to hold that the collection of the taxes involved was barred, at the time of its payment, under the provisions of Sec. 277 (*a*) (2) and 278 (*c*) (*d*) and (*e*) of the Revenue Act of 1924; Sec. 278 (*d*) of the Revenue Act of 1926 and Sec. 278 (*d*) of the Revenue Act of 1928."

In support of our position in connection with these specifications we beg leave to quote from the opinion

of Judge Lowell in the suit of Hood Rubber Company *vs.* White, Collector, in the United States District Court of Massachusetts, decided August 29, 1928, 28 Fed. (2nd) 54, which passed directly on the question here involved as follows:

> "The government's contention that the waiver did not limit the time of collection of the tax to six years is unsound. The government takes advantage of the six-year period for assessment, and then says that the six-year period for collection was changed by the later statute of 1924 (26 U. S. C. A., section 1061), which allowed six years after a valid assessment for collection. The government cannot have its cake and eat it too. Either the waiver conferred no power on the government to make the assessment later than the statutory period allowed, or it set up a six-year restriction on collection as well as assessment. It is distinctly unfair for the government to take advantage of one part of the waiver and refused to be bound by the other part of it. The statement made in the government's brief and in some of the cases, that the waiver was made by the taxpayer and the Commissioner with future statutes in view, seems far-fetched. A distinct limitation of six years (one year more than the period then prescribed by statute) was expressly put in the waiver, showing that the six-year period was a matter of importance to both sides. As the taxing statutes were being changed at nearly every session of Congress, the parties would undoubtedly have referred to future taxing acts had they had them in mind.
>
> The government cites cases to the effect that 'no officer of the government has the right to waive the statute of limitations in favor of the

United States.' See, for instance De Arnaud *vs.* United States 151 U. S. 483, 14 S. Ct. 374, 38 L. Ed. 244. These cases are sound law, but they apply only to statutes of limitation then in force, and not to ones which are prescribed by Congress in later acts. In this case the Commissioner did not waive a statute of limitation; it was the taxpayer who waived it and gave more time to the Commissioner to assess and collect the taxes.

(2) The government also contends that Congress had the power to change the time for collection set up by the waiver without thereby infringing any of the plaintiff's constitutional rights. This argument is unsound. It was to the advantage of both parties that the period of limitation should be extended and it was of special advantage to the plaintiff that it should know when the taxes might be considered as unenforceable, so that it might properly arrange its financial affairs. This seems to be clearly a case of a binding contract, which cannot be varied by subsequent legislation. C. & N. W. Ry. Co. *vs.* United States, 104 U. S. 680, 26 L. Ed. 891."

We therefore respectfully urge the Court to grant the writ of certiorari and after due proceedings to sustain the contention of this appearer, and for all general and equitable relief.

E. H. RANDOLPH,
ALLEN RENDALL,
A. B. FREYER,
Counsel for Petitioner.

ALLEN RENDALL,
A. B. FREYER,
Of Counsel.

(7771)

FILE COPY

DEC 23
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 118.

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD.,
Petitioner,

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S BRIEF.

E. H. RANDOLPH,
ALLEN RENDALL,
A. B. FREYER,
JAMES CRAIG PEACOCK,
Counsel for Petitioner.

December, 1929.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Opinions of the Courts Below	1
Jurisdiction	2
Statement of the Case	2
Questions Presented	5
Specification of Errors	5
Summary of Argument (with index to pages)	6
Argument:	
I. Form 1031-T, filed prior to March 15, 1919, was "the return" within the meaning of the statutes, and the assessment in the present case was barred because not made within the statutory five-year period, plus the additional year given by the consent in writing	7
II. That Form 1031-T was "the return" has since been held by two other Federal courts in well-considered opinions which expressly decline to follow the decision of the Court of Appeals in the present case.	33
III. Section 239 of the Revenue Act of 1918 does not require any different conclusion	33
IV. The additional taxes here in question were illegally collected for the further reason that they were not collected within the period for collection provided by the consent in writing or by law	43

Page

V. Conclusion 62

Appendix A. (*Brandon Corp. v. Jones*, 33 F. (2d) 969) 63

Appendix B. (*White v. Hood Rubber Co.*, 33 F. (2) 739) 71

AUTHORITIES CITED.

Table of Cases.

Atlantic Coast Line v. Burnette, 239 U. S. 199.... 51
Aiken v. The Commissioner (unreported)..... 60
Boston Hide & Leather Co., 5 B. T. A. 617.....35, 36
Bijur Motor Co. v. Eclipse Mach. Co., 237 Fed. 89. 27
Brandon Corporation v. Jones, 33 F. (2d) 969, 8, 22, 25, 26, 31, 33, 35, 36
Chicago & Northwestern Railway v. United States, 104 U. S. 680 53
Citizens Bank v. Miller, 16 F. (2d) 163..... 51
Colmer-Green Lumber Co., 12 B. T. A. 256.....37, 39
Dallas Brass & Copper Co., 3 B. T. A. 856, 864.34, 36, 37
Danzer v. Railroad, 268 U. S. 633..... 51
Davis v. Mills, 194 U. S. 451..... 51
Harrisburg, The, 119 U. S. 199..... 51
Hood Rubber Co. v. White, 28 F. (2d) 54 at 55..49, 56
Kaufman, Walter, v. Commissioner, 14 B. T. A. 602 36
Kollock, In re, 165 U. S. 526 24
Lamborn, Arthur H., 13 B. T. A. 177..... 24
Lancaster Lens Co., 10 B. T. A. 1155..... 37
Loewer Realty Co. v. Anderson, 31 F. (2d) 268, 270 32
Logan v. Davis, 233 U. S. 613, 627 21

Page

Mabel Elevator Co., 2 B. T. A. 517..... 28
Marx v. American Malting Co., 169 Fed. 582..... 27
Maryland Casualty Co. v. United States, 251 U. S. 342, 359..... 24
Matteawan Manufacturing Co., 1 B. T. A. 789.... 24
Murray v. Gibson, 15 How. 421 57
National Refining Company, 1 B. T. A. 236.....28, 35
National Tank & Export Co. v. United States, 35 F. (2d) 381..... 37
Perkins Oil Company v. Eberhard (Tenn.), 64 S. W. 762..... 27
Rasmussen v. Brownfield, 31 F. (2d) 89..... 34
Reliance Mfg. Co. v. Commissioner, 7 B. T. A. 583 36
Russell v. United States, 278 U. S. 181.....60, 61
Schwab v. Doyle, 258 U. S. 529..... 57
Stetson & Ellison, 11 B. T. A. 397.....37, 39, 41
Texas & Pacific Rwy. Co. v. Murphy, 111 U. S. 488 2
Thomas v. United States, 22 F. (2d) 1000....28, 30, 36
Union Pacific R. R. v. Bowers, 24 F. (2d) 788...28, 29
United States v. Cabot, 5 Am. Fed. Tax Rep. 6172 57
United States v. Ellicott, 223 U. S. 524..... 2
United States v. Field, 255 U. S. 257..... 57
United States v. Magnolia Petroleum Co., 276 U. S. 160..... 57
United States v. Mabel Elevator Co., 17 F. (2d) 109.....36, 37
United States v. Johnston, 124 U. S. 236 21
United States v. Whyel, 19 Fed. (2d) 260..... 59
White v. Hood Rubber Co., No. 414, 33 Fed. (2d) 739.....8, 19, 22, 31, 33, 36

Statutes.

Page

Act of February 13, 1925, (43 Stat. 936) 2
Revenue Act of 1918, (40 Stat. 1057)
Sec. 227 ..... 11, 27
Sec. 239 ..... 27, 33, 35, 42
Sec. 241 (a) (40 Stat. 1075-1082) 11, 27
Sec. 250 ..... 11, 19, 22, 23, 27, 30, 43
Sec. 253 25
Revenue Act of 1921 (42 Stat. 265)
Sec. 250 (d) 3, 9, 28, 30, 35, 43, 47
Revenue Act of 1924 (43 Stat. 253)
Sec. 277 ..... 4, 5, 9, 28, 44, 57, 58
Sec. 278 ..... 3, 5, 9, 28, 44, 57, 58, 60
Revenue Act of 1926 (44 Stat. 116)
Sec. 278 (d) 5
Sec. 1113 2
Revised Statutes
Sec. 3176 ..... 23, 25
Sec. 3226 2

Miscellaneous.

Congressional Record, 57th Cong., page 3131.... 13
Corporation Trust Income Tax Service, 1919, par. 3245 24
Williston on Contracts, Sec. 621, Note 9 and cases there cited 27

Bureau of Internal Revenue Rulings and Regulations.

Regulation 45,
Art. 52 ..... 37, 41
Art. 407 ..... 25, 28, 31, 37, 42
Art. 444 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 118.

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD.,
Petitioner,

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S BRIEF.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 29 F. (2d) 895, and is also printed at R. 38.

The opinion of the District Court (W. D., La.) is reported at 26 F. (2d) 505, and is also printed at R. 15.

Jurisdiction.

Judgment against the present petitioner was originally entered by the Circuit Court of Appeals on December 19, 1928 (R. 40). Petition for rehearing was filed by this petitioner on January 7, 1929, and the order denying the petition was not entered by that court until March 1, 1929 (R. 41). Petition for writ of certiorari was filed in this Court on May 31, 1929 (R. 41), which was within three months (Sec. 8 of Act of February 13, 1925, 43 Stat. 936) after the order of March 1, 1929. The three months period under such a statute runs from the date of final action on the petition for rehearing. *United States v. Ellicott,* 223 U. S. 524; *Texas & Pacific Rwy. Co. v. Murphy,* 111 U. S. 488. The petition for writ of certiorari was granted by this Court on October 14, 1929 (R. 41).

Statement of the Case.

This is a suit for the recovery by petitioner of additional income and profits taxes for 1918 on the ground that these taxes were erroneously or illegally assessed and collected within the meaning of R. S. Sec. 3226 as amended by Sec. 1113 of the Revenue Act of 1926 (44 Stat. 116).

The statutory period of limitation on assessment and collection was five years from the date of filing the return, but by written consent of the parties, it was agreed that determination, assessment, and collection might be made within one year after the end of the statutory period. The case presents two entirely in-

dependent issues arising under the statute of limitations. The first issue is whether the **assessment** was made within six years after *the return* was filed, and turns on the question as to which of two papers was the return within the meaning of the statute and therefore started the running of the statute of limitations. The second issue is whether the **collection** became barred at the end of the statutory period plus the year covered by the said consent. If the assessment was barred, then by the same token collection was also barred, but if held otherwise as to the assessment then this second issue turns on the further question of whether Sec. 278 (d) of the subsequently enacted Revenue Act of 1924 permitting collection within six years after assessment applies where a different period for both assessment and collection had already been fixed by a statutory consent in writing.

The facts are simple. Prior to March 15, 1919, petitioner was required to and did file its tentative return on Form 1031-T for 1918 (R. 2, 4, 5, and copy of Form on page 14 of insert preceding R. 31). On June 16, 1919, petitioner filed Form 1120 for the same year (R. 2, 10, and copy of Form at page 2 of insert following R. 30). Sec. 250(d) of the Revenue Act of 1921 provided that any additional tax for 1918 "shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no * * * proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed." On or before March 4, 1924, petitioner filed a so-called waiver which was also signed by the Commissioner consenting "to

a determination, assessment, and collection" of taxes for 1918. The waiver expressly provided that it "will remain in effect for a period of one year after the expiration of the statutory period of limitations * * * within which assessment of taxes may be made for the year * * * mentioned." (Copy of waiver is printed at R. 15).

The parties are in agreement as to the validity of the waiver and that its effect was at least to permit both assessment and collection at any time within the additional year after the end of the statutory period. The petitioner maintains, however, that the five year period had started on the filing of Form 1031-T prior to March 15, 1919, and therefore the additional sixth year terminated not later than March 15, 1925, and that the **assessment** on June 11, 1925 (R. 39), was therefore barred. Petitioner further maintains that even should it be held that the period for assessment extended until June 16, 1925, nevertheless by virtue of the same waiver or consent the period for collection terminated on that same day and the **collection** which occurred on or after August 28, 1925 (R. 4, 11), was therefore barred. A decision favorable to our position on either of these issues is sufficient to dispose of the case by reversal of the decision below. We understand the Government's position to be that the original period did not start until the filing of Form 1120 on June 14, 1919, and that the subsequent enactment of the Revenue Act of 1924 (43 Stat. 253) on June 2, 1924, operated to modify the terms of the waiver. The court below decided both these questions in the Government's favor (R. 38, 40).

Questions Presented.

1. Whether the return on Form 1031-T was "the return" within the meaning of the statutes?

2. Whether the consent in writing could be and was changed by the subsequently enacted Revenue Act of 1924 and whether retroactive effect is to be given to Sec. 278 (d) of that Act?

Specification of Errors.

The petitioner specifies and urges the following errors as grounds for reversal of the judgment below:

1. The Court erred in holding that "the consent in writing (R. 46) simply served to enlarge the period of limitation and otherwise to leave unchanged the provisions of law relating to collection as well as to determination and assessment of the tax" and did not change the existing rights of the parties.

2. The Court erred in holding that the period of limitation for the assessment and collection of taxes began to run from the date of the filing of the completed return instead of from the date of the filing of the initial return.

3. The Court erred in holding that the case does not in any wise differ in principle from the case of *United States vs. Crooks*, 18 Fed. (2nd) 449.

4. The Court erred in refusing and failing to hold that the collection of the taxes involved was barred, at the time of collection, under the provisions of Secs. 277(a) (2), and 278(c), (d) and (e) of the Revenue Act of 1924, and Sec. 278 (d) of the Revenue Act of 1926.

SUMMARY OF ARGUMENT.

I. Form 1031-T, filed prior to March 15, 1919, was "the return" within the meaning of the statutes, and the assessment in the present case was barred because not made within the statutory five-year period plus the additional year given by the consent in writing. Page 7.

1. Form 1031-T was a sufficient return to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for filing the return. Page 11.

2. Form 1031-T was a sufficient return to constitute notice and demand for payment of the first installment under the statutory provision that in the case of the first installment the instructions printed on "the return" shall be deemed sufficient notice and demand. Page 19.

3. Form 1031-T was a sufficient return to form the basis for assessments which under internal revenue law and practice must be based on a "return." Page 22.

4. Form 1031-T was a sufficient return to subject a taxpayer who failed to file it to the statutory penalties for failure to make "a return" and to make it on time. Page 25.

5. Form 1031-T was a sufficient return to be expressly so termed on its face and in the Commissioner's official statements to the public. Page 26.

6. Form 1031-T must necessarily have been the return within the meaning of the statute which contemplated only one return in each case. Page 27.

II. That Form 1031-T was "the return" has since been held by two other Federal courts in well-considered opinions which expressly decline to follow the decision of the Court of Appeals in the present case. Page 33.

III. Section 239 of the Revenue Act of 1918 does not require any different conclusion. Page 33.

IV. The additional taxes here in question were illegally collected for the further reason that they were not collected within the period for collection provided by the consent in writing or by law. Page 43.

1. The period of limitation applicable to the collection of the taxes in question was established by the agreement of March 1, 1924, between petitioner and the Commissioner of Internal Revenue. Page 46.

2. The agreement of March 1, 1924, was not affected by the Revenue Act of 1924. Page 52.

3. The language of the Revenue Act of 1924 cannot be construed to be applicable to the facts in the case at bar. Page 56.

V. Conclusion. Page 62.

ARGUMENT.

I. Form 1031-T, filed prior to March 15, 1919, was "the return" within the meaning of the statutes, and the assessment in the present case was barred because not made within the statutory five-year period plus the additional year given by the consent in writing.

We feel that at the very outset this Court may well note the somewhat unusual circumstances under which

this issue comes before it. Ordinarily a petitioner or appellant must bear the burden of the argument in overcoming whatever presumption of correctness attaches to the decision appealed from and in convincing the appellate court that it should take the affirmative step of reversing the decision below. Here, however, the situation may be somewhat different. This Court also has on its docket another case in which it has granted the Government's petition for a writ of certiorari (*White v. Hood Rubber Co.*, No. 414), and in which the decision below on this same question as to Form 1031-T is in the taxpayer's favor. It appears therefore that this Court must either reverse the decision of the Circuit Court of Appeals for the Fifth Circuit in the present case or that of the Circuit Court of Appeals for the First Circuit in the *Hood* case, and there is no presumption that the decision below in the present case is any more correct than the contrary decision in the *Hood* case. As a matter of fact the presumption might well be the other way as the *Hood* case is the more recent and the court in that case rendered a comprehensive opinion expressly considering and declining to follow the decision here appealed from. Indeed since the decision by the Court of Appeals in the present case not only has the Court of Appeals for the First Circuit considered it and declined to follow it, but still another federal court has also fully considered it and in an opinion in which its reasons are set forth at length has also expressly declined to follow it. We refer to *Brandon Corporation v. Jones*, 33 F. (2d) 969 (Dist. Ct., E. D. South Carolina), the opinion of Judge Cochran in which was adopted almost in its entirety in the opinion of the Court of Appeals in the *Hood* case.

Turning now to the statutes we find that Sec. 250(d) of the Revenue Act of 1918 (40 Stat. 1083) provided that

> "the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made * * *"

Sec. 250(d) of the Revenue Act of 1921 (42 Stat. 265) provided that

> "the amount of any such taxes due under any return made * * * under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax;"

Secs. 277 (a) and 278 (c) of the Revenue Act of 1924 (43 Stat. 299, 300, approved June 2, 1924, a few days before this assessment was made) provided that

> "Sec. 277 (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—* * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, * * *"

and

> "Sec. 278. * * *
>
> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment

of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

The return here having been filed under the Revenue Act of 1918 (40 Stat. 1057) we must turn to that Act to test the status of Form 1031-T, and unless otherwise noted the references from here on under this point are to that Act. For more convenient reference by the Court, we also insert here to face page 11 a complete copy of Form 1031-T in blank as originally furnished to taxpayers. A photostat of the Form as filled in and filed by the petitioner will be found on page 14 of the insert immediately preceding R. 31.

The petitioner submits that there can be no real question that Form 1031-T and that form alone was *the return* within the meaning of the statutes. The principal reasons in support of our position may be summarized as follows:

1. Form 1031-T was a sufficient return to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for filing the return.

2. Form 1031-T was a sufficient return to constitute notice and demand for payment of the first installment under the statutory provision that in the case of the first installment the instructions printed on "the return" shall be deemed sufficient notice and demand.

3. Form 1031-T was a sufficient return to form the basis for assessments, which under internal revenue law and practice must be based on a "return."

INCOME AND PROFITS TAXES

AND

EXTENSION OF TIME FOR FILING RETURN

TAX RETURN AND ESTIMATE

OF

ORIGINAL

THIS FORM WITH DUPLICATE AND REMITTANCE COVERING ONE-FOURTH OF ESTIMATED TAX MUST REACH THE COLLECTOR'S OFFICE ON OR BEFORE MARCH 15, 1919.

Form 1031 T—UNITED STATES INTERNAL REVENUE SERVICE

TENTATIVE RETURN AND ESMATE OF CORPORATION INCOME AND PROTS TAXES AND REQUEST FOR EXTENSION OF TIME FOR FIG RETURN

PRINT BELOW TAXPAYER'S NAME AND PRINCIPAL PLI OF BUSINESS

Do not write in this space

AMOUNT PAID

$_____

(Cashier's Stamp)

Check or draft _____

Money order _____

Currency or coin _____

Certificate of indebtedness _____

Date_____ (To be entered in payer.) No._____ (To be entered by Collector.)

Collector of Internal Revenue,

_____

The amount stated below is remitted herewith in payment of not less than one-fo th of the estimated amount of the income, war-profits, and excess-profits taxes for the year ended _____ of the corporation whose name and address appear at the head of this form.

An extension of _____ days in the time allowed for filing a complete return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

_____

_____

_____

NOTE.—A parent company may make a tentative return and pay the first instalment of the tax on behalf of all its subsidiaries without apportioning the tax among them until the completed return is filed.

Estimated amount of tax _____ $_____

Amount of remittance herewith:

Check or draft.	Money order.	Currency or coin.	Certificates of indebtedness.	Total
$	$	$	$	$

AFFIDAVIT

The undersigned, president and treasurer, respectively, of the corporation whose name and address appear at the head of this form, being severally duly sworn, each for himself deposes and says that the foregoing is a fair estimate of the total amount of the income, war-profits and excess-profits taxes of the said corporation for the period stated above, and that the above-stated reasons

...PLICATE
...be sent to Collec-
...or with original)

THIS FORM
...ULY APPROVED
BY THE
...OLLECTOR MUST
ACCOMPANY
...HE TAXPAYER'S
COMPLETED
RETURN
WHEN FILED

TENTATIVE RETURN AND ESTIMATE
OF
CORPORATION INCOME AND PROFITS TAXES
AND
REQUEST FOR EXTENSION OF TIME FOR FILING RETURN

PRINT BELOW TAXPAYER'S NAME AND PRINCIPAL PLACE OF BUSINESS

FOLD OUT IS TOO LARGE TO BE FILMED

...PENALTIES

For Making False or Fraudulent Return.

Not exceeding $10,000 or not exceeding one year's imprisonment, or both, in the discretion of the court, and, in addition, 50 per cent of the tax evaded.

For Failing to Make Return on Time.

Not more than $1,000, and, in addition, 25 per cent of the amount of tax due.

Date _____ (To be entered by taxpayer.) No. _____ (To be entered by Collector.)

...llector of Internal Revenue.

_____

The amount stated below is remitted herewith in payment of not less than one-fourth of the estimated amount of the income, war-...fits, and excess-profits taxes for the year ended _____ of the corporation ...se name and address appear at the head of this form.

An extension of _____ days in the time allowed for filing a completed return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

_____

_____

_____

NOTE.—A parent company may make a tentative return and pay the first installment of the tax on behalf of all its subsidiaries ...out apportioning the tax among them until the completed return is filed.

...mated amount of tax _____ $_____

...unt of remittance herewith:

Check or draft.	Money order.	Currency or coin.	Certificates of indebtedness	Total.
	$	$	$	$

COLLECTOR'S APPROVAL.

In consideration of the filing of this tentative return and the payment of not less than one-fourth of the estimated amount of the tax, ...for the reasons stated above, the time for filing the completed return of the taxpayer whose name and address appear at the head ...is form is hereby extended, by authority of the Commissioner of Internal Revenue, until _____

If the remittance accompanying this tentative return exceeds one-fourth of the tax as computed on the completed return, the ...s will be credited against the balance remaining to be paid. If the remittance is less than one-fourth of the tax, the balance ...with interest at the rate of six per cent per annum from March 15, 1919, must accompany the completed return. If the amount ...exceeds the total tax as shown by the completed return the excess will be refunded.

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4. Form 1031-T was a sufficient return to subject a taxpayer who failed to file it to the statutory penalties for failure to make a "return" and to make it on time.

5. Form 1031-T was a sufficient return to be expressly so termed on its face and in the Commissioner's official statements to the public.

6. Form 1031-T must necessarily have been "the return" within the meaning of the statute which contemplated only one return in each case.

We now proceed to consider in detail each of the above mentioned points in the order named.

1. *Form 1031-T was a sufficient return to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for filing the return.*

Sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075-1082) required that returns for the calendar year 1918 be filed on or before March 15, 1919, but provided further that the Commissioner of Internal Revenue might grant a reasonable extension of time for filing returns.

Section 250(a) of the same act (40 Stat. 1082) provided that the tax shall be paid in equal quarterly installments, that the first installment shall be paid at the time fixed by law for filing the return, and that:

> "Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so pro-

> vides in granting the extension. In any case in which the time for the payment of any installment is at the request of the taxpayer thus postponed, there shall be added as part of such installment interest thereon at the rate of 1/2 of 1 per centum per month from the time it would have been due if no extension had been granted until paid."

It will be noted that if the Commissioner granted an extension on his own initiative the time for payment of the first installment would have been correspondingly extended and there would have been no interest payable for such period by the taxpayers.

The income and profits taxes of 1918 constituted the greatest single levy of any tax in the history of our country, and it is common knowledge that the first installment due on March 15, 1919, alone amounted to approximately $1,200,000,000, and that the financial condition of the Government was such that it could not permit any extension of the time for the collection of that installment. One single need in itself called for $800,000,000 as had already been announced by an administration spokesman on the floor of the Senate on February 11, 1919, when Senator Simmons, Chairman of the Finance Committee, in presenting the report of the conferees on the Revenue Act of 1918, said:

> "In order to bring the two Houses together upon these 602 amendments, it is obvious that a vast amount of work was required. That the conferees were able to accomplish this result in a little over two weeks shows that their work was constant and diligent; but even with the greatest diligence, Mr. President, it would have been impossible to accomplish this result within so short a time had not every member of the conference been alive to the

fact that the exigencies of the situation required the utmost speed.

I desire to say to the Senators who do me the honor to hear the brief statement I am going to make, that I am advised by the Commissioner of Internal Revenue and the Secretary of the Treasury that Government obligations amounting to more than $800,000,000 will mature and will have to be paid by the 15th day of March next, and that the money which it is expected to realize from the first installment under this bill has been pledged for the payment of those maturing obligations.

The Commissioner of Internal Revenue further advises me that, relying upon the assurances that were given to him by the conferees that this bill could be passed at this session, and passed within a short time, he has abandoned all purpose of arranging to collect taxes except under this bill, and that if for any reason this bill should fail or be delayed so long as to make it impossible for him to collect the taxes this year under it the Treasury Department and the Government would be placed in a most embarrassing position." (Cong. Rec., 57th Cong., p. 3131.)

The bill was promptly passed and was approved by the President on February 24, 1919.

Meanwhile on February 13, 1919, the Commissioner of Internal Revenue had issued the following public statement (italicizing supplied):

"To collectors of internal revenue and others concerned:

Although *no general extension of time will be authorized for filing Federal Income Tax returns due March 15,* the Commissioner of Internal Revenue has approved a novel feature of tax collection which will serve for all practical purposes as a possible extension of forty-five days for the filing

of corporation income and excess profits tax returns in cases where corporations are unable to complete and file their returns of March 15.

If a corporation finds that, for good and sufficient reason, it is impossible to complete its return by March 15, *it may make a return of the estimated tax due and make payment thereof not later than March 15.* If meritorious reason is shown as to why the corporation is unable to complete its return by the specified date, the collector will accept the payment of the estimated tax and agree to accept the revised and completed tax return within a period of not more than 45 days.

Under the plan adopted for corporation payments and returns, *the Government will be able to collect approximately the amount of tax due on or before March 15, thus meeting its urgent needs,* and corporations actually requiring further time for the preparation of their complete returns will be granted ample time in which to do so.

One of the advantages of this plan is that it relieves the taxpayer of one-half of one per cent interest per month that would be attached to the payment of the taxes under an extension granted at the request of the taxpayer. The taxpayer will, of course, not be relieved of interest on such amount as his payment may fall short of the tax found later to be due on the basis of his final return.

Should the payment on March 15 of the estimated tax due be greater than the tax eventually found to be due on examination of the completed return the excess payment will automatically be credited to the next installment which will be due on June 15.

Provision for systematically handling this new feature will be made in the construction of the new return blanks for corporations. The new form will be a combined income and excess profits blank, embodied in which is a detachable letter of

remittance. Any corporation which finds that, for sufficient reasons, it cannot complete its return by March 15, may detach and fill out the letter of remittance, and forward same to the collector on or before March 15, together with a check, money-order or draft for the tax due on that date. If the exact tax is not known the estimated tax due will be paid in this manner. A statement in writing of the reasons why it is impossible for the corporation to complete the return by the specified date must accompany every such remittance.

Individual taxpayers will be given similar privileges in cases in which it is made clear by the taxpayer that the time available is not sufficient to enable him to complete his return by March 15. No reason exists, according to the Internal Revenue officials, for delaying the filing of the returns of individual incomes, except in unusually difficult cases.

Forms for returns of individual incomes up to $5,000 will be distributed by collectors within a few days. Forms for larger incomes will be available about February 24. Corporation blanks will be distributed March 1. Regulations governing the administration of the new Income Tax will also be available before March 1.
February 13, 1919.

DANIEL C. ROPER,
Commissioner of Internal Revenue,"

and again on February 27, 1919, he issued an additional statement modifying somewhat the procedure suggested in the earlier statement (italicizing supplied):

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

Income taxpayers both corporations and individual, were today granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15, to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess profits returns, *provided in every case the taxpayer pays on or before March 15 at least 25% of the estimated amount of the tax due.*

A supply of blanks of Form 1040-T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of Internal Revenue today. Collectors will furnish this Form to any individual requesting an extension of time for the filing of his complete return for 1918.

The tentative *return to be used by corporations* who make payment of the estimated tax due on or before March 15 is being printed, **and a supply will be forwarded tomorrow to each collector, who will mail these Forms to every corporation on his list. (To be known as Form 1031-T.)**

Under the estimated tax procedure, which is now available to every taxpayer under the Income and Excess Profits Section of the New Revenue Law, *there is no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.*

It is urged by the Bureau that the estimates be computed on the most exact basis available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return the excess

payment will be automatically credited against the next installment, which will be due June 15.

The taxpayer will not be relieved, however, under this plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return.

Commissioner Daniel C. Roper, in announcing the further relief for taxpayers in the matter of completing their returns, stated that he believed the plan is not only simple and workable, *but adequately protects the interests of* the taxpayer and *the Government.*

February 27, 1919."

That this plan was solely in the interests of the Government and against rather than for the interests of taxpayers as such is only too obvious. There was of course never any question that the nineteen days remaining after the enactment of the revised income tax and the entirely new war profits tax was insufficient for the Commissioner to formulate and distribute throughout the country the necessary regulations and forms and for the taxpayers to complete and return them. Two alternatives confronted the Commissioner. Either he could grant a general extension for filling returns (which would carry with it a corresponding extension of the due date of the first installment), or he could require *a return* to be filed in any event by March 15, subject to whatever completion or correction might later be necessary. The essential difference between the plans was whether the taxpayers or the Government should have the use of over a billion dollars for an additional month or two.

It was for its own benefit therefore that the Govern-

ment devised this plan, the very keystone of which was the required filing of Form 1031-T *as a return*. Having reaped all the tremendous benefits of Form 1031-T being a return when it needed that form to be a return, it cannot now be heard to say that that form which it itself devised *as a return* was not a return. When the Commissioner elected not to grant any extension of time for filing returns, and distributed Form 1031-T to be filed as a return, he was acting within the provisions of the statute (*White v. Hood Rubber Co.*, 33 F. (2d) 739, 742) and by the same token he legally and irrevocably denominated Form 1031-T as *the return*.

And the courts have so held. In *Brandon Corporation v. Jones*, 33 F. (2d) 969, Judge Cochran expressly declined to follow the decision in the present case which is here appealed from and said at page 971:

> "It is clear, therefore, that the filing of Form 1031-T constituted such a return as to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for the filing of a return. See sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075, 1082), and section 250(a) of the same act (40 Stat. 1082).
>
> It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of February 13, 1919, and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919,

> and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the return which he then required must be deemed the return contemplated by the statute whether termed merely a tentative return or not."

In *White v. Hood Rubber Co.*, 33 F. (2d) 739, the Circuit Court of Appeals for the First Circuit likewise declined to follow the decision in the case at bar, and adopted and quoted almost in its entirety Judge Cochran's opinion in the *Brandon* case.

2. *Form 1031-T was a sufficient return to constitute notice and demand for payment of the first installment under the statutory provision that in the case of the first installment the instructions printed on "the return" shall be deemed sufficient notice and demand.*

Section 250(e) of the same act (40 Stat. 1083) provided that if any tax remained unpaid after it was due and for ten days after notice and demand by the Collector there should be added a penalty of 5 per cent plus interest at the rate of 1 per cent per month. Notice and demand by the local collector was a condition prerequisite to enforcing the collection of any tax, and it was only after such a notice and demand had been ignored for more than ten days that the tax could be collected by distraint or otherwise, and that penalty and interest could be asserted. The same section also provided, however, that—

> "In the case of the first installment provided for in subdivision (a) the instructions printed on the

return shall be deemed sufficient notice of the date when the tax is due and sufficient demand, and the taxpayer's computation of the tax on the return shall be deemed sufficient notice of the amount due."

It will be noted that it was the instructions printed *on the return* which were thus constituted by the statute sufficient notice and demand for the payment of the first installment and that it was the taxpayer's computation of the tax *on the return* which was in the same way constituted sufficient notice of the amount of the tax.

Form 1031-T (a copy of which faces page 11) provided for a tentative determination of the amount of the tax and carried in the usual form in the upper left-hand corner of the "Original" the following demand for payment of the first installment on or before March 15, 1919, as authorized by the statute—

"THIS FORM WITH DUPLICATE AND REMITTANCE COVERING ONE-FOURTH OF ESTIMATED TAX MUST REACH THE COLLECTOR'S OFFICE ON OR BEFORE MARCH 15, 1919."

The return on Form 1031-T which was thus required to be filed on or before March 15, 1919, together with a remittance for the first quarterly installment, must necessarily have been *the return* for the year 1918 as required by law.

Contemporary construction and application of the

statute by the authorities charged with its administration is entitled to great weight and should not be overturned except for cogent reasons. *United States v. Johnston*, 124 U. S. 236; *Logan v. Davis*, 233 U. S. 613, 627, and cases there cited. The statement of the rule in the latter case to the effect that "the *practical* interpretation" of a statute by the executive department charged with its administration is entitled to the highest respect and ordinarily will not be changed is especially applicable where, as here, the Government authorities so definitely elected to treat Form 1031-T as *the return*. If it was "the return" when they needed the immediate payment of $1,200,000,000, and if it was "the return" when it was necessary to treat it as such in order to save to the Government interest at the rate of 6 per cent for one or more months on that same $1,200,000,000, and if it was "the return" when they needed it as such in order to constitute the notice and demand which was a legal prerequisite to collection of that $1,200,000,000, can they now be permitted to claim that it was not the return because with the emergency over and having irretrievably gotten the full benefit of treating it as "the return" they can now in a few isolated cases get a little more benefit by taking the contrary position? Either it was the return or it was not the return, and to hold that it was not the return must at the same time be to hold that $1,200,000,000 was collected by our Government as taxes without any authority at all. When the Government's position is stated in this way it becomes apparent how ridiculous it is. There has never been a single reason advanced or suggested which would give any support whatever to a charge that this procedure on the part of the Government authorities in 1919 was un-

authorized, and unless it can be demonstrated to have been unauthorized Form 1031-T must have been *the return within the meaning of the statutes.*

And here again the courts have so held. In the *Brandon* case Judge Cochran also said at 33 F. (2d) 969, 971:

> "But the tentative return was sufficient to constitute a return in another aspect. Section 250(e) of the same act (40 Stat. 1083) provides that if any tax remains unpaid after it is due and for 10 days after notice and demand, there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax; but the same section provided that in the case of the first installment, the instructions printed on the return should be deemed sufficient notice of the date when the tax is due, and sufficient demand. Form 1031-T contained instructions complying therewith, and was a sufficient notice and demand to make the first installment payable on March 15, 1919."

and in the *Hood* case the Circuit Court of Appeals for the First Circuit at 33 F. (2d) 739, 742, also adopted in full this part of his opinion.

3. Form 1031-T was a sufficient return to form the basis for assessments which under internal revenue law and practice must be based on a "return."

Under internal revenue statutes and procedure a "return" was a necessary prerequisite to the making of an assessment, and the Commissioner has always considered Form 1031-T as "the return" for that purpose. Internal revenue procedure, as developed in the administration of the minor taxes in effect prior to

the ratification of the income tax amendment, was thereafter adopted in large part for the administration of the income and profits taxes. That procedure contemplated an assessment by the Commissioner based on a return by the taxpayer. It was expressly adopted for income tax purposes by the Revenue Act of 1918 for the year 1918 here in question. Section 250(d) of that Act provides that—

> "the amount of tax *due under any return* shall be determined and assessed by the Commissioner within five years after the return was due and was made."

and instead of this section following immediately after Sec. 250(b), which directs the Commissioner to examine returns filed by the taxpayer in the regular way, there was deliberately inserted between the two sections the further provision of Section 250(c) incorporating by reference R. S. Sec. 3176 (which directs the Collector or the Commissioner to make a return from his own knowledge in every case where the taxpayer fails to make a return). Congress thus made it clear that Sec. 3176 applies to income and profits tax returns and that assessment of such taxes as authorized in Section 250(d) is based in every instance on a return, which is to be made by the Collector or the Commissioner in the event of failure on the part of the taxpayer.

With this word of preliminary explanation let us now inquire whether a so-called tentative return has been considered sufficient ground for an assessment, and we find as a still further instance of "practical interpretation" by the executive department that it most certainly has been so considered. It has already

been shown that no extension of time for filing the return for 1918 was granted to taxpayers as a whole (including the petitioner), but there were of course some instances where because of special reasons an extension of time for filing any return was needed. Art. 444 of Regulations 45, relative to the granting of such extensions by the Commissioner, provided—

> "The Commissioner will grant no such extension beyond the original due date of the third installment of the tax. Either a complete or *a tentative return,* as complete as possible and *giving a ground for assessment of the tax,* must be submitted on or before the due date as extended."

These regulations, originally promulgated March 5, 1919 (Corp. Trust Income Tax Service, 1919, par. 3245), and in effect when the tentative return in the present case was filed, were made by the Commissioner and the Secretary of the Treasury under the authority of Sec. 1309 of the Revenue Act of 1918 and have the same force and effect as a statute (*In re. Kollock,* 165 U. S. 526; *Maryland Casualty Co. v. U. S.,* 251 U. S. 342, 359).

In accordance with these regulations the Commissioner has always considered that assessments may properly be made on such tentative returns, and for concrete examples of assessments made on tentative returns on Forms 1031-T or 1040-T for 1918 filed in March, 1919, (the same as in the present case) see the findings of fact in *Matteawan Manufacturing Co.,* 14 B. T. A. 789, (corporation return on 1031-T), and *Arthur H. Lamborn, et. al.,* 13 B. T. A. 177, (individual returns on Form 1040-T).

If Form 1031-T is *the return* for purposes of mak-

ing an original assessment against the taxpayer, then by the same token it must also be *the return* for purposes of starting the running of the statutory limitation on the making of additional assessments against that same taxpayer. This reasoning has also been approved in the *Brandon* case, 33 F. (2d) 969, 972.

4. Form 1031-T was a sufficient return to subject a taxpayer who failed to file it to the statutory penalties for failure to make "a return" and to make it on time.

Section 3176 of the Revised Statutes and Section 253 of the Revenue Act of 1918 (40 Stat. 1085) provided severe penalties for making a false or fraudulent *return* or for failure to make a *return* on time. These penalties are printed in a conspicuous place on the "Duplicate" page of 1031-T, and, taken in connection with the notice and demand printed on the form that it must be filed on or before March 15, there is no question that when to its interest to do so the Government held that these penalties applied to Form 1031-T just the same as to any other return, and that it was intended to convey that impression to the taxpayers. Here again, will the Government concede that these various penalty provisions as well as the notice and demand for filing the return or paying the tax were unlawfully printed and asserted on Form 1031-T? The assertion of such penalties would be legal because it falls within the provision of Art. 407 of Regulations 45 (which under the authorities just cited under subpoint 3 has the force of law) that—

> "In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a

> tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return *is replaced* by a return made on the proper form."

As was said in the *Brandon* case, 33 F. (2d) 969, at page 972 (and also in part in the *Hood* case, 33 F. (2d), 739, 742):

> "Again, Form 1031-T contained an explicit statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must therefore be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose.
>
> There are other purposes for which the tentative return is treated as a return, but it is unnecessary to pursue the discussion further on that line."

5. *Form 1031-T was a sufficient return to be expressly so termed on its face and in the Commissioner's official statements to the public.*

We cannot better express our position on this aspect of the case than has already been done for us by the courts in the *Brandon* and the *Hood* cases, where at 33 F. (2d) 971 and 33 F. (2d) 741 it is said:

> "The tentative return certainly cannot be construed to be merely an agreement for extension of time, and to constitute no return in any aspect. The Commissioner in his ruling of February 13, 1919, called it a 'return' and in the ruling of February 27, 1919, a 'tentative return.' In Form 1031-T itself, it is called a tentative return. There was certainly some reason for insisting that the paper be styled a tentative return. If it was not

a return at all, but merely an agreement for an extension of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. It is clear, therefore, that the filing of Form 1031-T constituted such a return as to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for the filing of a return. See sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075, 1082), and section 250(a) of the same act (40 Stat. 1082)."

And if there still could be any question that Form 1031-T was the return it is to be remembered that this form was not drawn up by this petitioner but was prepared and distributed by the respondent itself. We have in mind of course that cardinal rule of construction that "in cases of doubt, the instrument will be construed most strongly against the person who actually drew up the paper, or in whose behalf it was drawn"—

Perkins Oil Company v. Eberhard, (Tenn.) 64 S. W. 762;
Marx v. American Malting Co., 169 Fed. 582;
Bijur Motor Co. v. Eclipse Mach. Co., 237 Fed. 89;
Williston on Contracts, Sec. 621, Note 9 and cases there cited.

6. *Form 1031-T must necessarily have been the return within the meaning of the statute which contemplated only one return in each case.*

Sections 227, 239, 241 and 250 of the Revenue Act of 1918 (40 Stat. 1075-1083) which relate in one way or another to the filing of corporation returns for 1918

are unanimous in their reference to "a return" or "the return" always in the singular number, and it is well established that one and only one return was required or contemplated by the statute, and that if revised, or completed, or amended returns were subsequently filed they related back to the initial return *nunc pro tunc:*

> *National Refining Company,* 1 B. T. A. 236;
> *Mabel Elevator Co.,* 2 B. T. A. 517;
> *Union Pacific R. R. v. Bowers,* 24 F. (2d) 788;
> *Thomas v. United States,* 22 F. (2d) 1000;
> Regulations 45, Article 407.

In the *National Refining Company* and the *Mabel Elevator Company* cases, the Board of Tax Appeals held that the filing of an amended return does not start anew the running of the statute of limitations and overruled the prior holding of the Commissioner of Internal Revenue (I. T. 1714) to the contrary. In the *National Refining Company* case the initial return for 1917 had been filed on March 15, 1918, and on October 11, 1923, an amended return was filed. After pointing out at page 240 that "we cannot find in any of the acts any express language or implication that amended returns are contemplated or that they will be given any special significance," the Board continued at page 241 (italics in original)—

> "Sections 250(d) of the Act of 1921 and 277(a)(2) of the Act of 1924 provide that the limitation shall operate 'five years after *the return* was filed.' The phrase *the return* has a definite article and a singular subject; therefore, it can only mean one return, and that *the return* contemplated by the act under which it was filed. The Revenue Acts

of 1916 and 1917 provided for the time and place of filing returns in identical language (Sec. 13(b)(1)), and specified:

> *The return* shall be made to the collector of the district in which is located the principal office of the corporation, company, or association, where are kept its books of account and other data from which *the return* is prepared. * * * (Italics ours.)

Again we find a definite article and a definite subject described, viz, *the return.* The language of the sections referred to does not describe *any return* or *many returns,* but one special return which is to be filed in one special place at or within a specified time. The taxpayer complied with the law when it filed returns on March 15, 1918, and the Commissioner had five years from that time within which to assess and collect the taxes thereon. This period was extended to March 5, 1924, by express waivers being filed by the taxpayer and approved by the Commissioner.

The taxpayer's Exhibit 5 can not be considered a return within the contemplation of the Revenue Act of 1921, because (1) the only return contemplated by the act had been filed on March 15, 1918; (2) it was not intended to be anything but evidence by the taxpayer; (3) it was not filed in the office of the collector of the district in which the principal office of the corporation is located; and, (4) if it could be a proper amendment and was properly filed, it would operate to amend or correct *nunc pro tunc* as of the date of filing of the original."

In *Union Pacific R. R. Co. v. Bowers,* the taxpayer in 1925 filed an amended return for 1922 and paid a tax liability shown thereon in addition to that on the original return. The only question was whether, hav-

ing voluntarily filed the amended return, it was liable for interest on a deficiency from the date when the tax should have originally been paid. In holding that it was so liable the Circuit Court of Appeals for the Second Circuit, after quoting the provision of Section 250(d) of the Revenue Act of 1921 which is identical with the provisions of Section 250(d) of the Revenue Act of 1918 to the effect that:

> "If it then appears that the correct amount of the tax is greater or less than that shown *in the return,* the installments shall be recomputed."

held at page 790—

> " 'If it then appears' means appears at the time when the Commissioner makes his examination, but it does not follow that the Commissioner has a right to make his recomputation upon the basis of an amended return filed to correct mistakes. *The original return alone has any statutory recognition* and still showed a 'deficiency' of $413,724, in view of the information available at the time the Commissioner made the assessments of $44,475.32, interest due in September, 1925." (Italicizing supplied)

In *Thomas v. United States,* 22 F. (2d) 1000, a taxpayer and his wife had made a joint return and the question was whether the statute of limitations ran from the date of that return or from the date of two separate returns which they were later permitted to file. The court held that the statute had run because the later returns should be treated

> "as amended returns; an amendment that *related* back to the original."

In Article 407 of Regulations 45 under this same Revenue Act of 1918 it is provided:

> "In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return *is replaced* by a return made on the proper form." (Italicizing ours.)

This view has been most forcibly and convincingly expressed by the courts in the following paragraph from the opinion in the *Brandon* case (33 F. (2d) 969, 972) which has also been repeated and adopted in full in the opinion in the *Hood* case (33 F. (2d) 739, 742):

> "The law clearly contemplates, so far as the starting of the statute of limitations is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The government cannot blow hot and cold. It cannot say to the taxpayer, 'File a paper which we know to be incomplete and does not give all the information required by law, and pay us the first installment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed return,' and then say later that, 'the first paper which you filed was no return and the statute must start from the date of the final completed return.' It cannot say, when its interests require it to do so, that the tentative return is a return, and then, when its interests require the contrary, say that it is no return."

Just as in *Loewer Realty Co. v. Anderson*, 31 F. (2d) 268, at page 270, the Circuit Court of Appeals (2nd) well said that—

> "the taxpayer should not in any event be allowed to repudiate a consent upon which the Commissioner has relied,"

so here the Commissioner should not be allowed to repudiate a return on which not only this petitioner, but all the taxpayers of the country, were forced by the Commissioner to act and to pay hundreds of millions of taxes.

We submit that there can be no question that in the present case the complete return related back to and amended the initial return on Form 1031-T filed March 15, 1919, and that that initial return was therefore the one contemplated by the statutes for all purposes.

We feel that in common fairness, this Government which has very properly treated Form 1031-T as *the return* on the various occasions when it was so tremendously to its advantage to do so, should treat it, or be compelled to treat it, as *the return* for all purposes. And when as here our arguments on both an equitable and a legal basis so far outweigh as well as outnumber the only even partial argument which has ever been seriously advanced on the other side (which we discuss below in Point III), we submit that there is all the more reason why the decision below should be reversed.

II. That Form 1031-T was "the return" has since been held by two other Federal courts in well-considered opinions which expressly decline to follow the decision of the Court of Appeals in the present case.

Under Point I of this brief we have made such constant references to and quotations from the *Brandon* and *Hood* cases that further discussion of those cases seems unnecessary. The full text of those two opinions, however, will be found printed as Appendices A and B at pages 63 and 71 respectively at the end of this brief.

III. Section 239 of the Revenue Act of 1918 does not require any different conclusion.

In the case at bar the Circuit Court of Appeals failed to state its reasons for its adverse decision on the question of Form 1031-T, but the opinion indicates very clearly that the court did not thoroughly consider the question although it was discussed at considerable length in the briefs of both parties in that court. The only possible argument on the other side that we can conceive could be even seriously advanced might be that this form was not a return because it may not fully conform to all the provisions of that part of Sec. 239 of the Revenue Act of 1918 (40 Stat. 1081) which reads:

> "Sec. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. * * *"

Such a contention, however, is most unconvincing as compared with the overwhelming weight of the argument the other way as set forth in Point I, *supra*.

It is true that such a suggestion was at the outset accorded some semblance of authority in an early decision of the Board of Tax Appeals (*Appeal of Dallas Brass & Copper Co.* 3 B. T. A. 856, 864), but examination of the record and briefs in that case show that the far more than countervailing arguments the other way were neither suggested to nor considered by the Board. Not only, however, has the reasoning in that case been rejected by the courts, but it is out of line and inconsistent with the Board's own more fully considered opinions on closely related points.

Both of these thoughts are brought out in the opinion of Judge Gilbert in *Rasmussen v. Brownfield*, 31 F. (2d) 89 (C. C. A. 9th Circuit), where he said at page 91:

> "Two income tax returns were filed by the plaintiff for the year ending January 31, 1919, a tentative return on March 15, 1919, and a complete return on June 16, 1919. The warrant of distraint was issued six years and one day after the first return was filed and five years and nine months after the second return was filed. The defendant contends that the statute of limitations began to run from the latter date. The pleadings disclose the fact that the second or complete return was only an itemized statement explanatory of the facts set forth in the prior return, and exhibited no additional or further tax liability than was disclosed by the former. The defendant relies upon the decision on the *Appeal of the Dallas Brass & Copper Co.*, 3 U. S. B. T. A. 856, in which it was held of the tentative return there involved, that for the reason that it contained none of the

information required by Sec. 239 of the Revenue Act of 1918, it must be regarded only as a request for an extension of time within which to file a return, and that the taxpayer could with no degree of propriety claim that the simple form used by it which contained none of the information required by the statute was a return which could start the running of the statute of limitations. To the same effect the defendant cites *Appeal of Boston Hide & Leather Co.*, 5 U. S. B. T. A. 617. But the same board held on the appeal in the *National Refining Company*, 1 U. S. B. T. A. 236, that the statute runs from the date of the original return. After reviewing the statutes the board said: 'We cannot find in any of the acts any expressed language or implication that amended returns are contemplated or will be given any special significance,' and the board quoted the ruling of the Solicitor that the filing of an amended return does not extend the date for the beginning of the running of the statue of limitations as outlined in Section 250(d) of the 1921 Act, but that the return referred to is the original return, with the exception that where additional taxes are disclosed by an amended return the return amounts to a limited waiver of the taxpayer to have such additional taxes determined, assessed and collected within the five year period, and the board held that the phrase 'the return' has a definite article and a single subject and therefore can only mean one return, the return contemplated by the act, citing *National Refining Co. Ohio*, 1 B. T. A. 240, 241."

Even more specific is the pungent comment in the *Brandon* case, 33 F. (2d) 969, where Judge Cochran said at page 972:

"It is argued, however, that the Board of Tax Appeals has consistently held that the statute does

not begin to run from the date of the filing of the tentative return, but from that of the completed return. *Appeal of Dallas Brass & Copper Co.*, 3 B. T. A. 856, 864; *Appeal of Boston Hide & Leather Co.*, 5 B. T. A. 617; *S. Walter Kaufman v. Commissioner of Internal Revenue*, 14 B. T. A. 602; *Reliance Mfg. Co. v. Commissioner of Internal Revenue*, 7 B. T. A. 583.

The rulings of the Board are entitled, of course, to great respect, but I am not bound by them. I have read them carefully and considered the reasoning of the Board in reaching their conclusion. But that reasoning does not seem to me convincing. It proceeds wholly upon the theory that because the tentative return does not contain the information it should contain, it must therefore be disregarded *as a return* and treated 'only as a request for an extension of time.' It ignores entirely the fact that the tentative return is effective as a return for certain purposes. These cases do not advert to the arguments that have been made before me that the tentative return must be deemed, and has been treated by the Board, as a return for some purposes."

and in the *Hood* case, 33 F. (2d) 739, where the Circuit Court of Appeals reached a similar decision on the authority of the *Brandon* case, and added at page 742—

"There are also decisions involving questions of like import, where the original return was incomplete in certain respects, and it was held that the supplemental return operated as an amendment of and related back to the original return, which fixed the time for reckoning the period of limitation. *Thomas v. United States* (D. C.) 22 F. (2d) 1000; *United States v. Mabel Elevator Co.* (D. C.) 17 F. (2d) 109."

Any weight that might once have been given to an argument such as that of the *Dallas Brass & Copper* case has since been impaired to the very vanishing point by a long line of decisions which establish that strict compliance with Sec. 239 is not an essential test of what is or is not a return within the meaning of the statute—

United States v. Mabel Elevator Co., 17 F. (2d) 109;
Lancaster Lens Co., 10 B. T. A. 1155;
Stetson & Ellison, 11 B. T. A. 397;
National Tank & Export Co. v. United States, 35 F. (2d) 381;
Colmer-Green Lumber Co., 12 B. T. A. 256;
Cf. also Regulations 45, Arts. 52 and 407.

All of the above cases related to exactly the same kind of question as in the present case, viz., whether a given return constituted a sufficient return to start the running of the statutory limitation against assessment or collection, and it is highly significant that several of them are more recent decisions of the Board of Tax Appeals itself.

In the *Mabel Elevator Co.* case, which in effect was an appeal from the decision of the Board of Tax Appeals already referred to in this brief, the court said—

> "It comes down to the question as to whether, when a taxpayer makes an honest return, which he believes to be in compliance with the law, the government can assess a deficiency against him after the expiration of 5 years, on the ground that it was *not in strict compliance with the law.* This question, it seems to me, must be answered in the negative, as it was answered by the United States Board of Tax Appeals, whose decision is reported

> in 2 B. T. A. 517. Otherwise, there would practically be no period of limitation whatsoever, and every man who made an inaccurate return could have a deficiency assessed against him at any time, because an inaccurate return is not a return made strictly in compliance with the law."

Even more closely in point, however, are the Board decisions cited above. It will be recalled that Sec. 239 was mandatory in its requirement that the return—

> "shall be sworn to by the president * * * and by the treasurer or assistant treasurer"

but was much less definite in its requirement as to the information to be furnished. There was no mandatory "shall" but merely an interpolated phrase qualifying the term "return" in these words—

> "stating specifically the items of its gross income and the deductions and credits allowed by this title."

Incidentally there was no definite requirement as to whether gross income or deductions should be itemized in one or two or three general classifications or in ten or twenty or thirty detailed classifications, that being all left to the Commissioner's discretion in preparing the return. The mere fact that he did not have time before March 15 to decide just how many classifications he desired and to publish and distribute forms is no reason why the statutory limitation should be extended for *more than five years* after the date on which he required a return and payment of the first installment. Congress clearly enacted that the date for filing the return and payment of the installment should be the same, and that if one was extended the

other should likewise be extended. Revenue Act of 1918, Sec. 250(a).

In *Stetson v. Ellison,* 11 B. T. A. 397, the question was whether the statute started to run on the filing of a consolidated return by another corporation with which petitioner was not in fact consolidated or upon the date when petitioner subsequently filed a separate and correct return. After findings as a fact with respect to the original consolidated return that—

> "Although the gross income, deductions and credits of the petitioner were included in the totals consolidated in the return, its figures, like those of the other affiliated companies, could not be separately identified from the face of the return."

the Board nevertheless held that that return was *the return* which started the running of the statute. After considering the matter at length for several pages the Board said at page 403—

> "Where a consolidated return has been prepared and filed in good faith, and the names of the companies included in the consolidation are made clear to the respondent, and all of the 'items of gross income and the deductions' are included therein, although said items of income and deductions may not be in sufficient detail to enable the respondent to accurately compute the tax against each of the companies, there is a 'substantial' compliance with the statute."

To the same effect see the other cases cited above, and particularly the following language in the Board's opinion in *Colmer-Green Lumber Co.,* 12 B. T. A. 256, at page 262 (italicizing supplied)—

"The schedules showing the balance sheet and analysis of surplus attached to the return filed on May 15, 1920, show separately assets and liabilities of each of the corporations for which the consolidated return was being made, *but did not show separately the items of income and deductions applicable to each.*

Was that return the return required by statute for the purpose of starting the running of the period of limitations? The respondent contends that it was not, since it was a consolidated return which did not show separately the items of income and deductions and the information required by the printed instructions appearing on the return and that a consolidated return was not required by statute for the two corporations.

* * * * * * * * *

The return indicated on its face that more than 50 per cent of the voting capital stock of two corporations was owned or controlled by the same interests. In view of the regulations and rulings of the Treasury Department with respect to consolidated returns and the uncertainty as to a definite basis for such returns, and the fact that the respondent raises no question as to the petitioner's good faith in filing a consolidated return, *we think that such return was filed in good faith.*

On the return appear the names of the two corporations with their respective addresses, and a statement that it is a consolidated return. Although the items of income and deductions for the respective companies were not segregated as to each company, all items of income and deductions were included in the returns. *We think that the consolidated return under the facts and circumstances was sufficient to start the running of the period of limitations.* The statute does not require that such a return include the separate income and deductions of each corporation. The regulations of the Commissioner, approved by the

Secretary, however, do provide that statements and schedules shall be filed giving details of the items of gross income and deductions. Whether the regulations were complied with, the Commissioner had the opportunity to determine. The respondent had an opportunity to audit the return and to determine whether it set forth the data and information in sufficient detail and to determine whether a consolidated or separate return should have been filed, as he subsequently did. *The period of limitation prescribed by statute is one of repose and it should not lightly be construed to permit the respondent to reopen cases upon the ground that the return filed in good faith was not the return required by statute.* We held in the *Stetson & Ellison case, supra,* that under a similar state of facts the consolidated return was sufficient to start the running of the period of limitation."

Cf. also the provisions of Art. 52 of Regulations 45 which read—

"In view of the unusual conditions prevailing at the close of the year 1918 it is recognized that many *items of gross income,* such as claims for compensation under cancelled contracts, together with claims against contracting departments of the Government for amortization and other matters, while properly constituting gross income for the taxable year 1918 were undecided and not sufficiently definite in amount to be reported in the original return for that year. In every such case the taxpayer should attach to his return a full statement of such pending claims and other matters, and when the correct amount of such items is ascertained an amended return for the taxable year 1919 should be filed."

and of Art. 407 of the same regulations that—

> "In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form."

both of which relate to this same year 1918 and contemplate that "*items* of its gross income" (quoted from Sec. 329) may be temporarily omitted from *the return.*

It is thus apparent that such "substantial compliance" with that section as is convenient under all the circumstances has long been considered by both the Board and the Treasury Department in the executive department of the Government, as well as by the courts, as sufficient to constitute a return. And especially should this be true where it was the *Government's own convenience* which dictated both the abbreviated form of 1031-T and the requirement that neither the date for filing of returns *nor that for payment of the first installment* should be extended.

We submit therefore that Sec. 239 does not in the least militate against the position taken in Point I, and we pass to the consideration of the other question presented by this case, viz., the effect to be accorded the written waiver or consent. The Court will note of course that if it holds with us under Point I that the additional period for assessment expired on March 15, 1925, and that the assessment was accordingly barred, it may reverse the judgment below on that ground without passing on any further questions.

IV. The additional taxes here in question were illegally collected for the further reason that they were not collected within the period for collection provided by the consent in writing or by law.

The taxes here in question were collected in several installments, the first of which was not paid until August 31, 1925 (R. 17). Even if the Government were correct in its contention that the original five year period for assessment and collection did not start until June 16, 1919 (R. 15), and hence continued until June 16, 1924, the collection beginning on August 31, 1925, would still have been barred. On March 1, 1924, both the Commissioner and the taxpayer had consented in writing to the assessment or collection of these taxes within a period of one year after the expiration of the statutory period of limitation (R. 15). The period of limitation, however, at the very latest expired on June 16, 1924, and the additional year by virtue of the consent did not permit collection subsequent to June 16, 1925. The petitioner therefore submits that in any event the collection on various dates beginning August 31, 1925, was erroneous and illegal, and that the judgment below should be reversed for this further reason.

Again we turn to the pertinent provisions of the statutes and find that Sec. 250 (d) of the Revenue Act of 1918 (40 Stat. 1083) provided:

> "No suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the return was due or made."

and Sec. 250 (d) of the Revenue Act of 1921 (42 Stat. 265) provided:

"The amount of income, excess-profits, or war-profits taxes due under any return made * * * under prior income, excess-profits, or war profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due * * * under prior income, excess-profits or war-profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed."

The Revenue Act of 1924 became law on June 2, 1924. Sec. 277 of that act (43 Stat. 299) provided:

"(a) Except as provided in Section 278 * * *."

"(2) The amount of income, excess-profits, or war-profits taxes imposed by * * * the Revenue Act of 1918 * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

and Sec. 278 of the same act provided:

"(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

"(d) Where the assessment of the tax is made within the period prescribed in Section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax."

"(e) This section shall not (1) authorize the

assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence or (2) affect any assessment made, or distraint or proceeding in court, begun before the enactment of this Act."

From the above-quoted sections of the Revenue Acts of 1918 and 1921 it is clear that the statutory period of limitation on the collection of taxes was five years, commencing with the date upon which the return was due or made. The Revenue Act of 1924, however, introduced a radical change in this respect by providing that collection might be made at any time within a new period of six years from the date of the assessment of the tax.

Since collection of the taxes in question was not made until over a year after the expiration of five years from the date when petitioner's return was filed (whether March 15, 1919, or June 16, 1919, is taken as the starting point of the period of limitation), the sole justification for the collection of taxes must be that such collection comes within the provisions of the Revenue Act of 1924, which must to that extent necessarily be held to be retroactive. That is the contention of the Government.

The petitioner respectfully submits that this contention is not sound, because the period of limitation within which the collection of the taxes in question could be made was established not by the Revenue Acts then or thereafter in effect, but had already been established by the agreement of March 1, 1924. Petitioner further contends that this agreement of March 1, 1924, was not affected by the Revenue Act of 1924;

and lastly petitioner submits that the language of the Revenue Act of 1924 cannot be so construed as to have application to the situation in the case at bar.

Our argument on this point is thus divided as follows:

> (*1*) *The period of limitation applicable to the collection of the taxes in question was established by the agreement of March 1, 1924, between petitioner and the Commissioner of Internal Revenue.*
>
> (*2*) *The agreement of March 1, 1924, was not affected by the Revenue Act of 1924.*
>
> (*3*) *The language of the Revenue Act of 1924 cannot be construed to be applicable to the facts in the case at bar.*

And we proceed to the consideration of these points in the order named.

1. *The period of limitation applicable to the collection of the taxes in question was established by the agreement of March 1, 1924, between petitioner and the Commissioner of Internal Revenue.*

In March of 1924 the time within which the Commissioner of Internal Revenue could legally assess and collect taxes for the year 1918 had very nearly expired. At that time whether or not additional taxes for that year were due from the petitioner was undetermined, and a similar situation prevailed with a host of other taxpayers throughout the country.

It is common knowledge that in this situation the Commissioner of Internal Revenue was faced with the alternative in the case of each taxpayer of making an immediate and arbitrary assessment and collection of additional taxes for the year 1918, or of securing the

taxpayer's consent that a new period of limitation be substituted for the statutory period provided by the Revenue Act of 1921. The Commissioner therefore mailed to the petitioner (it being one of the taxpayers in this situation), the so-called "Income and Profits Tax Waiver," which in the form set forth at R. 15 was subsequently executed by ~~Respondent~~ petitioner and the Commissioner under date of March 1, 1924. It reads as follows:

> "In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Florsheim Bros. Dry Goods Co. Ltd. of Shreveport, La., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profits, or war profits taxes due under any return made by or on behalf of the said Florsheim Bros. Dry Goods Co. Ltd., for the year 1918 under the Revenue Act of 1921, or under prior income, excess profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation, as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned."

The petitioner respectfully submits that from and after the effective date of this agreement the respective rights of the parties were limited by the terms of this agreement, and that nothing which has occurred sub-

sequent thereto could affect these rights in any way. By authority of the same Act which included the theretofore applicable statute of limitations, the agreement between the Commissioner and the petitioner had been substituted for the provisions of the Revenue Act in regard to the period of limitation for assessment, determination, *and collection* of taxes.

It cannot be said that this agreement was a mere extension of the statutory period. It is an agreement the terms of which were to remain in force for one year from a given date. The statutory period of limitation is mentioned in the agreement, not because it is to be extended by the agreement, but as fixing a date certain from which the one-year period during which the agreement was to be operative was to run.

We have, therefore, a definite bargain whereby the Commissioner, under the authority conferred upon him by the statute and for a valuable consideration, undertook to determine, assess, *and collect* additional taxes against the petitioner for the year 1918, within the period stipulated in the agreement, if such additional taxes were to be determined, assessed, and collected at all.

It must be conceded that the term within which the additional taxes in question could legally be assessed and collected is determined and limited either (a) by the terms of the Revenue Acts or (b) by the terms of the written agreement between the Commissioner and the petitioner.

Assuming the latter to control, the assessment might have been timely made if it could be conceded that the period of limitation commenced to run on June 16, 1919, rather than March 15, 1919; but collection was not begun until August of 1925, more than two months after

the last possible date on which collection could legally have been made under the agreement.

Assuming, however, that the agreement of March 1, 1924, is not to control, then even the assessment was not timely made, for it was not made on or before June 16, 1924, the last possible date for assessment under *any* of the Revenue Acts involved, and under a construction of the facts most favorable to the Government.

The District Court in *Hood Rubber Co. v. White,* 28 F. (2d) 54 at 55, well said—

> "The government's contention that the waiver did not limit the time of collection of the tax to six years is unsound. The government takes advantage of the six-year period for assessment, and then says that the six-year period for collection was changed by the latter statute of 1924 (26 U. S. C. A. Sec. 1061), which allowed six years after a valid assessment for collection. The government cannot have its cake and eat it too. Either the waiver conferred no power on the government to make the assessment later than the statutory period allowed, or it set up a six-year restriction on collection as well as assessment. It is distinctly unfair for the government to take advantage of one part of the waiver and refuse to be bound by the other part of it. The statement made in the government's brief and in some of the cases, that the waiver was made by the taxpayer and the Commissioner with future statutes in view, seems farfetched. A distinct limitation of six years (one year more than the period then prescribed by statute) was expressly put in the waiver, showing that the six-year period was a matter of importance to both sides. As the taxing statutes were being changed at nearly every session of Congress, the parties would undoubtedly have referred to future taxing acts had they had them in mind."

It is respectfully suggested that much of the confusion with reference to the legal effect of the so-called waivers is due to a misunderstanding as to the true legal effect of the period of limitations as applied to taxing statutes.

In a very real sense the period defined by taxing acts within which certain things must be done is not a true statute of limitations at all, as this term is usually technically defined.

To illustrate: A statute of limitations, as that term is generally used, means an enactment by a legislative body which provides the period within which legal claims may be enforced in courts. Such acts do not profess to, and of course could not change the basic rights of those to whom they are directed. If A is indebted to B in a certain sum of money, the fact that six years have elapsed without B's attempting to enforce his rights in a judicial proceeding does not in any way affect the indebtedness; it merely means that within a particular jurisdiction that right is not enforceable in the courts after the lapse of the six-year period. Furthermore, in most jurisdictions such statutes must be pleaded specially if advantage is to be taken of their provisions. They are so much outside of the issues presented to the courts for adjudication that no inquiry is ever made as to lapse of time, unless the question is raised specifically by the interested party.

But when Congress informs the taxing authorities of the terms and conditions which they must observe in levying taxes, and when among those terms and conditions there is a provision that such rights as they have must be enforced before a given date, then when this date arrives both the right and the remedy are gone. It is not a mere denial of the use of the judicial tribunal

to enforce the rights which the collector formerly had against the taxpayer; it goes to the root of the matter and says that unless the acts defined are done before a certain day all rights are gone. And this is well established by a long line of decisions of this court—

The Harrisburg, 119 U. S. 199.
Davis v. Mills, 194 U. S. 451.
Atlantic Coast Line v. Burnette, 239 U. S. 199.
Danzer v. Gulf, etc., Railroad, 268 U. S. 633.
Cf. also *Citizens Bank v. Miller*, 16 F. (2d) 163.

In *The Harrisburg* this Court said—

"This brings us to the second branch of the question, which is, whether, with the Statutes of Massachusetts and Pennsylvania above referred to in force at the time of the collision, a suit *in rem* could be maintained against the offending vessel if brought in time. About this we express no opinion, as we are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year; and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and

> the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

And so in the case at bar Congress in the Acts of 1918 and 1921 defined a five year period as the time within which the taxing authorities must exercise their rights against the taxpayer and upon the expiration of that period, the entire right of the taxing authorities to proceed was gone. In this case after June 16, 1924, no right could possibly have existed against this taxpayer under the statutes but a new right resulting from an agreement between the parties had in the meantime been created; namely, the right of the Commissioner to determine, assess and collect the tax within one year from that date; that is, before June 16, 1925, at the latest. Since this right was one given to the taxing authorities not by virtue of an act of Congress, but by the agreement of the parties, it follows that the terms and all of the terms of that agreement must be strictly complied with if the rights so given are to be exercised.

2. The agreement of March 1, 1924, was not affected by the Revenue Act of 1924.

Obviously, had there been no Revenue Act of 1924, the rights of the parties would have been governed by the terms of the consent, and the taxing authorities would have been obliged to determine, and assess, and collect within the period therein stipulated.

The Government contends, and the court below held, that the Revenue Act of 1924, enacted on June 2, 1924, so modified the terms of the consent as to allow the taxing authorities a new period of six years from the date of assessment within which to collect (*i. e.* a total

of more than twelve years from the original filing of Form 1031-T). The question therefore becomes one of statutory construction, namely: does the Revenue Act of 1924 expressly say that the Commissioner may on the one hand assess under the terms of the waiver and then on the other hand, disregarding its provisions with regard to collection, collect under the terms of the 1924 Revenue Act? It is respectfully contended that there is nothing in the Act which tends to show any intention on the part of Congress radically to so change and modify the status of the parties.

In *Chicago & Northwestern Railway v. United States*, 104 U. S. 680, the problem before this Court was practically identical with this issue in the case at bar. Briefly, the facts in that case were: Acting under authority of an Act of Congress, the Postmaster General entered into a written contract with the railroad company, whereby for four years the railroad company undertook to carry mail for the Government at the rate of a specified sum per mile. A subsequent Act of Congress provided for a reduction in the rates to be paid for carrying mail. Accordingly, the Postmaster General reduced the rates under the contract above referred to. Upon the completion of the four years of the contract the railroad brought suit against the United States to recover the difference between the contract price and the reduced rates. This Court, reversing the decision of the Court of Claims, held in favor of the railroad company.

The language of the opinion of this Court is so significant and so applicable that we quote it at length:

> "But when Congress authorized the Post Master General to fix the price by contract, within specified maximum rates, and for a period of four

years, it was an agreement on the part of the United States that the stipulated compensation should not be withheld during that period, which it could not refuse to perform without a breach of the public faith * * *.

"The power to establish the price includes the power also to declare the period of its duration; and if it be said that any contract which fixes both the price and its duration must be construed as subject to the continuous control of the power which made it, it must also be admitted that no change can be made without the abrogation of the contract. The Government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals. It might by a repeal of the contract, expressly stipulated, rest on the previous state and claim the bare rights it had before, but it cannot do more than that. It certainly cannot retain the obligation of the contract as against the company, and at the same time vary its own, unless it has reserved the right to do so in the contract itself * * *.

"It is argued, however, on the part of the Government, that the legal effect of what was done was to abrogate the old contracts and make new ones * * *.

"In our opinion, that view cannot be maintained. The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid, and binding on the United States as well as upon the Company. They contained, within themselves, a mode for lessening or, if deemed best, for discontinuing entirely, the described service; and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement; and the United

States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right.

"If, in these circumstances, the Government not merely accepted, but demanded, the performance of the contract service, the presumption is that it meant to pay this contract price. It would require positive and express words to negative that presumption. We find none such in the Statutes of 1876 and 1878. Their language may well be satisfied by confining them to cases where no time contracts for service were then in existence, and to contracts thereafter entered into. They do not legitimately apply to contracts then existing whose terms had not expired, such as those in the present case."

It is submitted that the situation discussed in this case is parallel to the situation in the case at bar. The petitioner and the Commissioner entered into an agreement, each one giving up a right in exchange for the agreement of the other. The agreement was one which the Commissioner was expressly authorized to make, and the terms as to its duration were explicit. Therefore, unless there is in the Revenue Act of 1924 an express repeal or abrogation of this contract, this subsequent Act of Congress cannot impose a new contract on the petitioner, and the Government cannot retain the obligation of the contract, so far as the petitioner is concerned, and at the same time vary the terms of the Commissioner's obligation. Nothing in the Revenue Act of 1924 can be pointed out which even hints that such a drastic measure was intended.

This precise question was passed on by the District Court in *Hood Rubber Co. v. White,* 28 F. (2d) 54, where it was held that Congress had no power to alter the agreement between the parties contained in the waiver. At p. 56 that court says:

> "The Government also contends that Congress had the power to change the time for collection set up by the waiver without thereby infringing any of the plaintiff's constitutional rights. This argument is unsound. It was to the advantage of both parties that the period of limitation should be extended and it was of special advantage to the plaintiff that it should know when the taxes might be considered as unenforceable, so that it might properly arrange its financial affairs. This seems to be clearly a case of a binding contract, which cannot be varied by subsequent legislation. C. & N. W. Ry. Co. v. United States, 104 U. S. 680, 26 L. Ed. 891."

Whether or not Congress had the power to abrogate the agreement between the parties, there certainly is nothing in the Revenue Act of 1924 which clearly shows its intention so to do, and hence the agreement between the parties stands unaffected by said Act.

3. The language of the Revenue Act of 1924 cannot be construed to be applicable to the facts in the case at bar.

We have shown that the rights of the parties were fixed and definite prior to the passage of the Revenue Act of 1924, the effective date of which was June 2, 1924. It follows, therefore, that so far as the parties to this action are concerned, if the Revenue Act of 1924 is to be held to affect their rights, said

statute must be given a retroactive construction.

It is established law that a statute will not be given a retroactive effect unless there is explicit language requiring it, or unless such effect must necessarily be implied from the context of the statute in question. See *Murray v. Gibson*, 15 How. 421.

This principle of statutory construction has been applied to the Internal Revenue Laws. See *Schwab v. Doyle*, 258 U. S. 529; *United States v. Cabot*, 5 Am. Fed. Tax Rep. 6172.

This principle has been clearly and succinctly stated in the case of *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, in the following language:

> "Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

As having a bearing on the legislative purpose behind the Revenue Act of 1924, it is significant that in section 277 of that act a separate sub-section is used to indicate the statutory period of limitation for taxes imposed by the 1921 and 1924 acts on the one hand, and by prior acts on the other. But in section 278(c), in regard to agreements between the Commissioner and the taxpayer (being the only section in the 1924 act which refers to such agreements), assessment only is mentioned, nothing being said of collection; and reference is not made to any particular act. But under the Revenue Act of 1921, which was not repealed in this particular by the 1924 act, the provision in regard to such an agreement expressly and conjunctively refers to determination *and* assessment *and* collection. See *United States v. Field*, 255 U. S. 257,

for the rule of statutory construction in respect to words conjunctively used in a statute.

It is submitted that the inference from this is irresistible that Congress intended the Act of 1924 to be a point of departure from the earlier laws, leaving whatever existed under these earlier laws to be worked out in accordance with their provisions, and framing a new act for the future. It follows under this view that nothing in the 1924 act was intended to affect the rights of taxpayers as they existed at the time the act was passed, and that the assessment of the additional taxes in question, even though made after the enactment of the 1924 act, was made under the terms of the agreement between the petitioner and the Commissioner, and not under the terms of the new tax law.

Referring now to the language of the pertinent provisions of the 1924 Act, if it was the intention of Congress to make the provisions of that act apply to the assessment and collection of taxes due under prior Revenue Acts, such intention must be found to be expressly declared, or necessarily implied, if at all, by the first clause of section 277(a) which introduces the provisions as to the limitation on the assessment and collection of taxes due under prior Revenue Acts, and which reads as follows:

> "Except as provided in Sec. 278."

taken together with section 278, subsections (d) and (e), which read as follows:

> "(d) Where the assessment of the tax is made within the period prescribed in Section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax.

"(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint, or by a proceeding in the court if at the time of the enactment of this Act such assessment distraint, or proceeding was barred by the period of limitation then in existence or (2) affect any assessment made, or distraint or proceeding in court, begun before the enactment of this Act."

These very sections were under consideration in the case of *United States v. Whyel,* 19 Fed. (2d) 260 (in the District Court), and 28 Fed. (2d) 30 (in the Circuit Court), and the opinion of the court in that case held that Congress did not intend that a retroactive effect be given to, or implied by, the language of these sections.

The opinion of Judge Thompson in the decision of that case before the District Court (p. 263) states:

"The question as to whether Section 278 (e) (1) and (2) was intended to relate to the future only, or was to be given a retroactive effect, is conclusively settled by the proceedings before the committee of finance of the Senate, which had under consideration the Revenue Act of 1924. A. W. Gregg, appearing as a special assistant to the Secretary of the Treasury, referring to the section, which had just been read, said: 'That is to keep this section from having any retroactive effect, or to apply to things happening before its passage.'

"Again, when the section was under consideration, Mr. Gregg said: 'That is to prevent the giving of any retroactive effect to the provisions of this Act. The taxes under prior Acts stand on their own footing, and this applies only after the passage of this Act.' "

The conclusion reached in that case was later confirmed by this Court in *Russell v. United States,* 278 U. S. 181, where the vital question upon which the decision of the case rested was whether or not section 278 of the 1924 act should be given a retroactive construction. This Court said:

> "No plain purpose to change the status of the claim against the petitioners as it existed just before June 2, 1924, can be spelled out of the words in Sec. 278, or otherwhere."

In the case at bar the court below proceeded on what we believe we have shown to have been an utterly erroneous theory that the effect of the consent is to extend the statutory period of limitations, and having been so extended, the provisions of the Revenue Act of 1924 become operative. To a like effect is the case of *Aiken vs. The Commissioner* recently decided by the Circuit Court of Appeals for the Eighth Circuit and not yet reported. But if our position is sound that once the period of limitations created by the statute had expired and the rights of the parties thereunder were gone, it of necessity follows that neither by agreement nor by any other means could the statutory period itself be enlarged or extended. Moreover, these cases seem inconsistent with the decision of this Court in *Russell v. United States, supra.,* the purport of which was that the status of the claim against the taxpayer as it existed just before June 2, 1924, was not in any wise altered by the Revenue Act of 1924.

It is clear that, although the actual assessment of the additional taxes in the case at bar was not made prior to June 2, 1924, the facts of this case are en-

tirely analogous to the facts in the case of *Russell v. United States* and other cases cited above, because in lieu of such assessment, the time for which had nearly expired, the Commissioner entered into the agreement of March 1, 1924, with the petitioner.

Should this taxpayer who, several months prior to the passage of the Revenue Act of 1924, granted to the Commissioner further time within which to enforce possible rights against him, be in a less favorable situation than the taxpayer who stood on his strict legal rights and thereby forced the Commissioner to act immediately, if he were to act at all? To reach such a result the language of Congress must be compelling, which is not the case with any of the pertinent provisions of the Revenue Act of 1924.

Summarizing, the petitioner respectfully submits that the period of time within which the additional taxes in question could legally have been collected was defined by agreement between it and the Commissioner of Internal Revenue, and that the terms of this agreement were not modified by the Revenue Act of 1924. It is further contended that, if this agreement is held not to establish the period of limitation for collection of these taxes, then the statutory period of limitation provided by the Revenue Act of 1921 must govern, there being no basis to be derived from the language of subsequent Revenue Acts or from the decisions of the courts interpreting such acts for holding that such Revenue Acts should be given retroactive effect. The additional taxes in question not having been collected either within the period of limitation provided in the agreement or within the statutory period provided by the Revenue Act of 1921, their subsequent collection was illegal.

V. Conclusion.

In conclusion, our position may be summarized as follows:

1. The additional taxes involved in this case were illegally collected, because they were not assessed within the period of time provided by agreement or by law for their assessment.
2. The additional taxes involved in this case were illegally collected, because they were not collected within the period of time provided by agreement or by law for their collection.

Having been illegally collected, the additional taxes in question must be repaid to the petitioner, with interest from the date of payment, and the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be therefore reversed with directions to enter judgment for petitioner.

Respectfully submitted,

E. H. Randolph,
Allen Rendall,
A. B. Freyer,
James Craig Peacock,
Counsel for Petitioner.

December, 1929.

APPENDIX A.

BRANDON CORPORATION V. JONES, COLLECTOR OF INTERNAL REVENUE

33 F. (2d) 969.

ERNEST F. COCHRAN, District Judge. Woodruff Cotton Mills (hereinafter called "the taxpayer") paid under protest to the collector income taxes which had been assessed against it amounting to $52,686.73. The taxpayer and certain other mills were consolidated into Brandon Corporation, the plaintiff, and all choses in action and property of every kind of the taxpayer became vested in the plaintiff. The plaintiff brought suit to recover the taxes in question, and amended its complaint so as to present all the facts fully, and the defendant has interposed a demurrer. It is conceded that if the demurrer is sustained, the plaintiff cannot amend further, and the complaint in that event must be dismissed. It is also conceded that if the demurrer is not sustained, the defendant has no answer to the facts and that a judgment for the plaintiff must be entered upon the pleadings, together with a certificate of probable cause for the acts of the collector pursuant to the statute.

The parties also concede that there is but a single question of law presented, and that is whether Form 1031-T, filed by the taxpayer on March 14, 1919, styled the tentative return, or Form 1120, filed June 16, 1919, styled the completed return, was the return, the filing of which started the running of the five-year statutory period of limitation on assessment and collection of additional taxes for the year 1918 (Revenue Act 1921, § 250(d), 42 Stat. 265).

The Revenue Act for 1918 was enacted on February 24, 1919 (40 Stat. 1057). Under the act, returns were

to be filed by March 15, 1919, and the tax paid in quarterly installments on March 15, June 15, September 15, and December 15, 1919. The law also provided that in case an extension of time for filing the return was granted, the date for payment of the first installment should be correspondingly extended. It was evident that many taxpayers would be unable to prepare their returns by March 15. The requirements of the government, however, were such that it was advisable that the first installment should be paid by that time. In order to meet this situation, the Commissioner of Internal Revenue issued two rulings, one on February 13, 1919, and the other on February 27, 1919. In the first ruling, it was stated that no general extension of time would be authorized, but that the Commissioner had approved a novel feature of tax collection which would serve for all practical purposes as a possible extension of 45 days for the filing of the return, where the parties were unable to complete and file their return by March 15. He also announced in that ruling that if a corporation finds it impossible to complete its return in time, it might make a return of the estimated tax due and make payment thereof not later than March 15; and if a meritorious reason was shown why the corporation was unable to complete its return, the collector would accept the payment of the estimated tax and agree to accept a revised and completed tax return within a period of not more than 45 days. The ruling of February 27, 1919, contains the following pertinent clauses:

> "Income taxpayers both corporation and individual, were today granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March

15, to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess profits returns, provided in every case the taxpayer pays on or before March 15, at least 25 per cent of the estimated amount of the tax due.

"A supply of blanks of Form 1040-T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of Internal Revenue today. Collectors will furnish this Form to any individual requesting an extension of time for the filing of his complete return for 1918.

"The tentative return to be used by corporations who make payment of the estimated tax due on or before March 15 is being printed, and a supply will be forwarded tomorrow to each collector, who will mail these Forms to every corporation on his list. (To be known as Form 1031-T.)

"Under the estimated tax procedure which is now available to every taxpayer under the Income and Excess Profits Section of the new Revenue Law, there no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.

"It is urged by the Bureau that the estimates be computed on the most exact basis available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return the excess payment will be automatically credited against the next installment, which will be due June 15.

"The taxpayer will not be relieved, however, under this plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return."

Pursuant to these rulings, the taxpayer on March 14, 1919, filed its tentative return on Form 1031-T, together with a statement of the estimated amount of the tax accompanied by a remittance of one-fourth thereof. This form contains the statement that the form and remittance covering one-fourth of the estimated tax must reach the collector's office on or before March 15, 1919. On the duplicate, under the head of "Penalties," it is stated that there is a penalty of $1,000 for failure to make return on time. On June 16, 1919, the completed return was filed.

The government contends that inasmuch as the tentative return did not contain the information which the law provides the return shall contain, it cannot be deemed the return required by law, and amounts to nothing more than an agreement for an extension of time; and therefore the completed return must be deemed the return from the filing of which the statute begins to run. The taxpayer, however, contends that even conceding that the tentative return does not contain all of the information required by law, nevertheless it was a return for several purposes, and must therefore be deemed the return from the filing of which the statute starts to run. I am in accord with the contention of the taxpayer. The tentative return certainly cannot be construed to be merely an agreement for extension of time, and to constitute no return in any aspect. The Commissioner in his ruling of February 13, 1919, called it a "return," and in the ruling of February 27, 1919, a "tentative return." In Form 1031-T itself, it is called a tentative return. There was certainly some reason for insisting that the paper be styled a tentative return. If it was not a return at all, but merely an agreement for an extension of time, the taxpayer was not bound to pay

the first installment of his taxes until he filed the completed return. It is clear, therefore, that the filing of Form 1031-T constituted such a return as to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for the filing of a return. See sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075, 1082), and section 250(a) of the same act (40 Stat. 1082).

It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of February 13, 1919, and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the return which he then required must be deemed the return contemplated by the statute whether termed merely a tentative return or not.

But the tentative return was sufficient to constitute a return in another aspect. Section 250(e) of the same act (40 Stat. 1083) provides that if any tax remains unpaid after it is due and for 10 days after notice and demand, there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax; but the same section provided that in the

case of the first installment, the instructions printed on the return should be deemed sufficient notice of the date when the tax is due, and sufficient demand. Form 1031-T contained instructions complying therewith, and was a sufficient notice and demand to make the first installment payable on March 15, 1919.

Moreover, the Commissioner of Internal Revenue has always considered that assessments may be properly made on such tentative returns. For examples of assessments thus made, see Matteawan Mfg. Co. v. Commissioner of Internal Revenue, 14 B. T. A. 789, and Arthur H. Lamborn et al., v. Commissioner of Internal Revenue, 13 B. T. A. 177.

Again, Form 1031-T contained an explicit statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must therefore be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose.

There are other purposes for which the tentative return is treated as a return, but it is unnecessary to pursue the discussion further on that line.

The law clearly contemplates, so far as the starting of the statute of limitations is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The government cannot blow hot and cold. It cannot say to the taxpayer, "File a paper which we know to be incomplete and does not give all the information required by law, and pay us the first installment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed re-

turn," and then say later that, "the first paper which you filed was no return and the statute must start from the date of the final completed return." It cannot say, when its interests require it to do so, that the tentative return is a return, and then, when its interests require the contrary, say that it is no return.

It is argued, however, that the Board of Tax Appeals has consistently held that the statute does not begin to run from the date of the filing of the tentative return, but from that of the completed return. Appeal of Dallas Brass & Copper Co., 3 B. T. A. 856, 864; Appeal of Boston Hide & Leather Co., 5 B. T. A. 617; S. Walter Kaufman v. Commissioner of Internal Revenue, 14 B. T. A. 602; Reliance Mfg. Co. v. Commissioner of Internal Revenue, 7 B. T. A. 583.

The rulings of the Board are entitled, of course, to great respect, but I am not bound by them. I have read them carefully and considered the reasoning of the Board in reaching their conclusion. But that reasoning does not seem to me convincing. It proceeds wholly upon the theory that because the tentative return does not contain the information it should contain, it must therefore be disregarded *as a return* and treated "only as a request for an extension of time." It ignores entirely the fact that the tentative return is effective as a return for certain purposes. These cases do not advert to the arguments that have been made before me that the tentative return must be deemed, and has been treated by the Board, as a return for some purposes.

My attention has also been called to the case of Florsheim Bros. Dry Goods Co. v. U. S., 29 F. (2d) 895, by the Circuit Court of Appeals, Fifth Circuit, which holds that the statutory period begins to run from the completed and not from the tentative return,

This is indeed high authority, and I should hesitate ordinarily not to follow it. But it does not appear that in that case the points that have been presented in this case were presented to the court. There is certainly no suggestion in the opinion that the court considered these points. All that is said in that case is as follows: "It is suggested in argument that the statutory period of limitations began to run from the date of the tentative return in March of 1919; but we are of the opinion that the return meant by the statute was the final or completed return."

I cannot but feel that if the attention of that court had been called specifically to the various cases in which the tentative return is deemed a return under the statute, the decision would have been otherwise. Although such high authority, as it is not from my own circuit, I do not feel I am absolutely bound to follow it, when my own views lead so strongly to a contrary conclusion. I am the more constrained to follow my own views, as this case will undoubtedly be appealed by one party or the other, whatever my decision may be; and as it will go up upon the pleadings, it is of no great moment which party shall carry the burden of the appeal.

It must be borne in mind also that if there is any room for doubt as to the construction or application of these taxing statutes, such doubt is to be resolved in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211; Bowers, Collector, v. New York & Albany Lighterage Co., 273 U. S. 346, 350, 47 S. Ct. 389, 71 L. Ed. 676.

For these reasons, an order overruling the demurrer will be entered, and the plaintiff may apply upon four days' notice for judgment upon the pleadings and a certificate of probable cause.

APPENDIX B.

WHITE, COLLECTOR OF INTERNAL REVENUE V. HOOD RUBBER CO.

33 F. (2d) 739.

Before BINGHAM, Circuit Judge, and MORRIS and BREWSTER, District Judges.

BINGHAM, Circuit Judge. This is a suit brought by the Hood Rubber Company, appellee, in the federal District Court for Massachusetts, to recover $39,043.99, the amount of an additional income and excess profits tax for the year 1918, which was collected by distraint on December 15, 1926. By stipulation in writing the case was tried before the court without a jury.

The plaintiff, appellee, on March 14, 1919, filed its income and excess profits tax return for the calendar year 1918, in which it estimated its tax at $300,000. This return was made on a form prescribed and furnished by the Treasury Department, known as "Form 1031-T" and designated as a "tentative return." At the time of filing this return the plaintiff paid one-quarter ($75,000) of the tax as shown by its return. And June 16, 1919, upon the demand of the collector, it paid as a second installment of the tax the further sum of $75,000. July 14, 1919, the plaintiff filed a complete, revised, or amended return, showing its total tax for the calendar year 1918 to be $169,772.65, and on December 12, 1919, paid the balance of the tax, $19,772.65, as shown by this completed or amended return. January 26, 1924, while the Revenue Act of 1921 was in force, the plaintiff and the Commissioner of Internal Revenue entered into a written agreement, authorized by section 250 (d) of the Revenue Act of 1921 (42 Stat 264), extending the statutory period of limitation (five years) an additional period of one year,

in which to determine, assess, and collect the amount of income and excess profits taxes due under any return made by the plaintiff for the year 1918 under the Revenue Act of 1921, or under prior income and excess profits acts.

Thereafter the Commissioner determined that an additional tax for the year 1918 was due, and on March 18, 1925, after the Revenue Act of 1924 was enacted (43 Stat. 253), assessed an additional tax against the plaintiff, which amounted to $39,043.99, after making certain deductions and allowance of credits. On December 15, 1926, a collection of this tax was had by distraint. A claim for refund was duly filed and rejected, and on January 12, 1928, this suit was brought.

In the District Court it was held that, if the word "return," as used in section 250 (d) of the act of 1921, meant the tentative return, the government did not assess the tax in time; but, if it meant the return of July 14, 1919, the assessment was made within the required five years plus the additional year provided for in the waiver agreement. It said, however, that the question need not be decided, for if it be granted that the completed or amended return fixed the time from which to reckon, and the assessment was seasonably made, the tax was not collected either within five or within six years from the filing of the completed return; that the government, having taken advantage of the six-year period for assessment, could not say that the six-year period for collection was changed by the subsequent act of 1924, which allowed six years after the assessment for collection; that either the agreement of waiver conferred no power on the government to make the assessment later than the statutory period allowed (five years), or the agreement applied to the

time fixed for the collection as well as the assessment; that it was to the advantage of both parties that the period of limitation should be extended—of advantage to the government for the reason that, at the time the agreement of waiver was made, the statutory limitation of five years had nearly expired, and of advantage to the plaintiff to know when the tax would become unenforceable, so that it might properly arrange its financial affairs. And, such being the case, the agreement of waiver constituted a binding contract, which Congress did not intend to have affected by the provisions of the act of 1924. Chicago & N. W. R. Co. v. United States, 104 U. S. 680, 26 L. Ed. 891. Having reached this conclusion, the court entered judgment for the plaintiff in the sum of $39,043.99, with interest amounting to $4,568.15, and cost of suit. It is from this judgment that this appeal is taken.

For reasons that will later appear, we do not find it necessary to consider whether the ground upon which the court below reached its conclusion was right or not.

The first question presented is whether the return filed March 14, 1919, is the one from which the five-year period of limitation (fixed by the Revenue Acts of 1918 and 1921 [40 Stat. 1057; 42 Stat. 227]), as extended by the waiver agreement of January 26, 1924, for one year, under the authority of the act of 1921, or whether the revised or amended return is the one from which the period of limitation is to be reckoned; for, if the former is the one, the additional tax of March 18, 1925, was not seasonably assessed.

There are apparently three cases in which this question has been under consideration in the federal courts. Florsheim Bros. Dry Goods Co., Limited, v. United

States, 29 F. (2d) 895, 896 (5th Cir. Ct. of App.), decided December 19, 1928; Rasmussen v. Brownfield-Canty Carpet Co., 31 F. (2d) 89, 91 (9th Cir. Ct. of App.), decided February 11, 1929, and Brandon Corp. v. Jones, Collector, 33 F. (2d), 969, decided March 30, 1929 (Eastern Dist. of So. Car.).

In the first case no discussion of the question was had. All that was said concerning the matter was: "It is suggested in argument that the statutory period of limitations began to run from the date of the tentative return in March of 1919; but we are of opinion that the return meant by the statute was the final or completed return."

In the second case Judge Gilbert pointed out that the Board of Tax Appeals had entertained contrary views, and he took the position that the original or tentative return, and not the completed or amended one, fixed the date for the beginning of the running of the statutes of limitation as outlined in section 250(d) of the act of 1921; but his associates refrained from expressing an opinion upon the question, as the distraint proceedings there in question were barred, whether the period of limitation began to run from the filing of the tentative return or of the completed or amended one.

In the third case the facts and circumstances attending the filing of the so-called tentative return (Form 1031-T, prescribed by the Commissioner of Internal Revenue) were presented and considered, and it was held that the period of limitation began to run from the filing of the original or tentative return (and not from the filing of the completed or amended return. It was there said:

"The Revenue Act for 1918 was enacted on February 24, 1919. Under the act, returns were to be filed by March 15, 1919, and the tax paid in quarterly instalments on March 15, June 15, September 15, and December 15, 1919. The law also provided that in case an extension of time for filing the return was granted, the date for payment of the first installment should be correspondingly extended [section 250 (a)]. It was evident that many taxpayers would be unable to prepare their returns by March 15. The requirements of the government, however, were such that it was advisable that the first installment should be paid by him by that time. In order to meet this situation, the Commissioner of Internal Revenue issued two rulings, one on February 13, 1919, and the other on February 27, 1919. In the first ruling, it was stated that no general extension of time would be authorized, but that the Commissioner had approved a novel feature of tax collection which would serve for all practical purposes as a possible extension of 45 days for the filing of the return, where the parties were unable to complete and file their returns by March 15. * * * He also announced in that ruling that if a corporation finds it impossible to complete its return in time, it might make a return of the estimated tax due and make payment thereof not later than March 15; and if a meritorious reason was shown why the corporation was unable to complete its return, the collector would accept the payment of the estimated tax and agree to accept a revised and completed tax return within a period of not more than forty-five days. The ruling of February 27, 1919, contains the following pertinent clauses:

" 'Income tax payers, both corporation and individual, were to-day granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax return for 1918. The statement that the taxpayer is unable by March

15, to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for 45 days the time for filing complete income and excess profits returns, provided in every case the taxpayer pays on or before March 15, at least 25% of the estimated amount of the tax due.

" 'A supply of blanks of Form 1040-T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of internal revenue to-day. Collectors will furnish this form to any individual requesting an extension of time for the filing this complete return for 1918.

" 'The tentative return to be used by corporations who make payment of the estimated tax due on or before March 15 is being printed, and a supply will be forwarded tomorrow to each collector, who will mail these forms to every corporation on his list. (To be known as Form 1031-T.)

" 'Under the estimated tax procedure, which is now available to every taxpayer under the income and excess profits section of the new Revenue Law [40 Stat. 1057], there is no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.

" 'It is urged by the Bureau that the estimates be computed on the most exact basis available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return the excess payment will be automatically credited against the next installment, which will be due June 15.

" 'The taxpayer will not be relieved, however, under this plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return.' * * *

"Pursuant to these rulings, the taxpayer on

> March 14, 1919, filed its tentative return on Form 1031-T together with a statement of the estimated amount of the tax accompanied by a remittance of one-fourth thereof. This form contains the statement that the form and remittance covering one-fourth of the estimated tax must reach the collector's office on or before March 15, 1919. On the duplicate under the head of 'Penalties' it is stated that there is a penalty of $1000 for failure to make return on time. On June 16, 1919, the completed return was filed."

After stating the respective contentions of the parties—that of the government, that the tentative return did not contain the information which the law required and amounted to nothing more than an agreement for an extention of time; and that of the taxpayer, that conceding that the tentative return did not contain all the information required by law, nevertheless it was a return for several purposes and must therefore be deemed a return from the filing of which the statute starts to run—the opinion continues.

> "The tentative return certainly cannot be construed to be merely an agreement for extension of time, and to constitute no return in any aspect. The Commissioner in his ruling of February 13, 1919, called it a 'return' and in the ruling of February 27, 1919, a 'tentative return.' In Form 1031-T itself, it is called a tentative return. There was certainly some reason for insisting that the paper be styled a tentative return. If it was not a return at all, but merely an agreement for an extension of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. It is clear, therefore, that the filing of Form 1031-T constituted such a return as to prevent the extension of time for payment of the first

installment which the statute provided in all cases of an extension of time for the filing of a return. See sections 227(a) and 241(a) of the Revenue Act of 1918 (40 Stat. 1075, 1082), and section 250(a) of the same act (40 Stat. 1082).

"It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the Rulings of February 13, 1919, and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the return which he then required, must be deemed the return contemplated by the statute whether termed merely a tentative return or not.

"But the tentative return was sufficient to constitute a return in another aspect. Section 250(e) of the same act (40 Stat. 1083) provides that if any tax remains unpaid after it is due and for 10 days after notice and demand, there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax; but the same section provided that in the case of the first installment, the instructions printed on the return should be deemed sufficient notice of the date when the tax is due, and sufficient demand. Form 1031-T contained instructions complying therewith, and was a sufficient notice and demand to make the first installment payable on March 15, 1919. * * *

"Again, Form 1031-T contained an explicit

statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must, therefore, be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose. * * *

"The law clearly contemplates, so far as the starting of the statute of limitation is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The government cannot blow hot and cold. It cannot say to the taxpayer, 'File a paper which we know to be incomplete and does not give all the information required by law, and pay us the first installment and we will allow you later to complete your returns, and readjust the amount of taxes in accordance with the completed return,' and then say later, that 'the first paper which you filed was no return and the statute must start from the date of the final completed return.' It cannot say, when its interests require it to do so, that the tentative return is a return and then when its interests require the contrary, say that it is no return."

There are also decisions involving questions of like import, where the original return was incomplete in certain respects, and it was held that the supplemental return operated as an amendment of and related back to the original return, which fixed the time for reckoning the period of limitation. Thomas v. United States (D. C.) 22 F. (2d) 1000; United States v. Mabel Elevator Co. (D. C.) 17 F. (2d) 109.

The original or tentative return filed in this case disclosed a tax of $300,000, based on the best information

then available—a tax in fact much larger than was the tax actually due. It was made on the form and in the manner required by the Commissioner and was the only return that could then have reasonably been made. It did not extend the time for payment of the tax disclosed, for the taxpayer was required to pay and did pay the first installment of $75,000 on the filing of the return, when under the law it was mandatory that payment of the first installment of the tax should be extended, if it was not the return required, but the mere grant of an extension of time for filing a return. It was the return that put the tax statute into operation as respects the payment of the particular tax, and caused the penalty feature of the law to become operative in case the taxpayer failed to pay at the appointed time. And the logical conclusion is that it was the return that also put the statutory period of limitation into operation; and we so hold.

The Commissioner unquestionably had authority to inaugurate and require the tentative return method of collecting the tax and the presumption is that he did so in conformity with law. Updike v. United States (C. C. A.) 8 F. (2d) 913; sections 1305 and 1309 of the Revenue Act of 1918 (40 Stat. 1142, 1143); and sections 1300 and 1303 of the Revenue Act of 1921 (42 308, 309 [26 USCA §§ 1244, 1254]). As the time for assessing and collecting the additional tax expired March 14, 1925, before the tax was assessed or collected, and before the Revenue Act of 1924 was enacted, the assessment and collection was unauthorized, and the judgment of the court below must be affirmed.

The judgment of the District Court is affirmed, with costs to appellee in this court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 118.

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD.,
Petitioner,
vs.
UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF.

ALLEN RENDALL,
A. B. FREYER,
E. H. RANDOLPH,
JAMES CRAIG PEACOCK,
Counsel for Petitioner.

January, 1930.

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IN THE

Supreme Court of the United States

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No. 118.

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD.,
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UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF.

At the very outset we are forced to take exception to the statement on page 3 of the Government's brief that "The pertinent provisions of the statutes and Treasury Regulations involved are contained in the appendix to this brief" and to the corresponding statement in the appendix at page 23 that the brief extracts there printed at pages 23 and 24 are "the pertinent provisions of the Revenue Act of 1918." Those extracts omit the provisions of Sec. 250(a) of that Act to the effect that where an extension of time for filing a return is granted the time for the payment of the first

installment shall be correspondingly postponed, and of Sec. 250(e) of the same Act to the effect that in the case of the first installment the instructions and computation of the tax on the return shall constitute sufficient notice and demand. It has already been shown at pages 11-12 and 19-20 of our original brief that those two provisions are extremely pertinent as to the status of Form 1031-T, and the omission of all reference thereto in the Government's brief cannot but stamp it as inadequate.

Indeed the entire brief for the Government is far more eloquent in what it does not say than in what it does say. Our original brief was in accordance with the rules filed two weeks before the Government's brief and set up specifically at least six express and controlling reasons why Form 1031-T was *the return* within the meaning of the statutes. In spite of these reasons being thus set forth in such form that they could not be overlooked, and in spite of it being thus made so easy for the Government to reply to them *seriatim,* if they could be replied to, the Government has studiously avoided any discussion whatever of the more important of those reasons. There is not a word in its brief with respect to our exhaustive and we believe convincing arguments that Form 1031-T was a sufficient return to prevent the postponement of the payment of the first installment, that it was a sufficient return to constitute notice and demand for payment of the first installment, that it was a sufficient return to subject a taxpayer to penalties for failure to file it, and that it was a sufficient return to be expressly termed a return on its face. The significance of such omissions from the Government's brief cannot be overlooked. It can mean but one thing—those arguments cannot be answered.

That portion of the Government's brief devoted to Form 1031-T contains little more than a suggestion several times reiterated that the tentative return "disclosed insufficient information to enable the Commissioner to make an assessment" and that it would be "impossible" for the Commissioner to determine the correct amount of tax (pages 9, 11, 12, 19), together with a quotation from the opinion of the Court of Claims in the *Oak Worsted Mills* case which is introduced as well expressing the views of the Government. We will comment briefly on each of these points.

The suggestion, which on page 9 rises to the dignity of a categorical statement, that Form 1120 gave sufficient information to make an assessment, and that Form 1031-T did not do so, shows a complete misapprehension on the part of the Government counsel as to the actual procedure of the Bureau of Internal Revenue. Not only have we already cited actual instances of assessments being made on tentative returns (Brief, page 24), but it is common knowledge that assessments, and especially additional assessments, are constantly made on information entirely different from that set forth in the most voluminous and complete returns, and also frequently made in cases where there is no sufficient information in any return. Large taxpayers, corporate and individual, know only too well that assessments are regularly made on the basis of revenue agents reports alone. The reports of the Federal courts and of the Board of Tax Appeals are full of decisions in cases of this sort. For example, we find a number of cases where the Commissioner has been sustained in simply ignoring the return, if any was filed, and assessing an income tax on the gross amount of the taxpayer's bank deposits during the year less

only such deductions as might appear in his check book or be otherwise satisfactorily established. *Paul Polichroniades,* 2 B. T. A. 1263; *Max S. Rosenthal,* 3 B. T. A. 1349; *J. E. Strong,* 6 B. T. A. 417; *Louis Wald,* 8 B. T. A. 1003; *E. M. Green,* 11 B. T. A. 185; *Ginn-Coleman Co.,* 12 B. T. A. 550. These cases just cited are all of that one particular class, but there are many other reported cases, as well as hundreds of unreported ones, in which the Commissioner has likewise discarded altogether the information in the return and based the assessment entirely upon the taxpayer's book figures or other information reported by the revenue agent. It really has been one of the minor tribulations of counsel who have represented clients in tax matters that so many of the audit letters from the Bureau would as a starting point for adjustments use the income as shown in the books or as shown in the revenue agent's report instead of that shown in the return itself.

It cannot be overlooked that the reference in Sec. 239 to the return stating the items of gross income and deductions is scarcely self-enforcing in the same sense as is the specific requirement of the statute and regulations that no suit shall be maintained for the recovery of overpayments of taxes until a claim for refund has been filed and that such claims shall set forth all the facts relied upon in support thereof. Sec. 239 as a practical matter calls for some supplementary direction by the Commissioner as to whether he wants the items in a few general classifications or in a larger number of more detailed classifications, and it has regularly each year been so supplemented by the Commissioner in the preparation of the return forms. If the specific requirement with respect to the content of a claim for refund may be waived by the Government in

an ordinary case in which there were no specific exigencies—and it has been expressly so held by this Court in *Tucker v. Alexander*, 275 U. S. 228,—then by the same token and for the same reasons there could seem to be no question that this less definite requirement with respect to a statement of the items of income and deductions could in the same way be waived under the pressing circumstances which made such action absolutely necessary in the spring of 1919 to avoid serious financial embarrassment to the Government.

Turning now to the *Oak Worsted Mills* opinion, on which the Government has at page 12 of its brief practically staked its entire case, it takes but a brief analysis to show its inconsistencies and unsoundness. The keystone on which it is built is in direct conflict with one of the very pertinent provisions of the Revenue Act of 1918 which both the Court of Claims and the Government in its present brief have so conspicuously ignored. In the quotation at the middle of page 16 of the Government's brief the Court of Claims summarized what it thought to be the entire situation in these words:

> "The proposition on the part of the commissioner was simply that if the taxpayer would file an estimate of his taxes and a request for extension of time for filing a return and make payment of one-fourth the estimated tax, the extension would be granted, and he had a right to make these requirements."

On the contrary the law was simply that—

> "Where an extension of time for filing a return is granted the time for payment of the first install-

ment shall be postponed until the date of the expiration of the period of the extension, * * *"
(Revenue Act of 1918, Sec. 250(a), 40 Stat. 1082.)

In other words the court, and the Government in adopting the court's opinion, are entirely wrong as to the requirements which the Commissioner had a right to make. He had no right to require immediate payment of the first installment if he granted an extension of time, and their argument based on such an error necessarily falls with it. The Commissioner had authority to do only one of two things. Either he could require the filing of the return (and payment of the tax), or he could grant an extension of time for filing the return (and for payment of the tax). He could not, and indeed did not, require the filing of anything other than *a return.*

This opinion—which so well expresses the views of the Government—is so unfair and unjust in its effort to convey the impression that the tentative return procedure was solely and wholly a "valuable concession" for the sole benefit of taxpayers that its inconsistency cries out aloud on the very face of the opinion. For example, we read at the top of page 16 that this whole proceeding was a concession to the taxpayer because the Commissioner might grant or refuse an extension in his discretion, but if we turn back to the bottom of page 12 and the top of page 13 we find that the Court had already admitted that the Act was not approved until February 24, 1919; that the Bureau would be deluged with requests for extensions of time for filing returns; that *"most of these applications would have to be granted"*; and that the result would be "to postpone the payment of taxes in such an amount that *the Government might become embarrassed.*" This has

already been discussed at length in our original brief, but it is interesting to note that this situation was so patent and outstanding that it could not be concealed even in an opinion which sought to justify a holding the other way.

Even the dictionary definition upon which the Court of Claims and the Government seek to rely arises only to confound them. If they had looked further in that same Webster's Dictionary which gives the meaning "experimental" they would also have found that a synonym for tentative is "provisional," and turning the pages they would in turn have found one of the definitions of that term to be "serving as a provision for the time being." What better confirmation could be asked of our position than this definition suggested by the Government's own brief that the tentative return served as a return for the time being, *i. e.*, from the date of its filing on March 15, 1919?

Respectfully submitted,

E. H. RANDOLPH,
ALLEN RENDALL,
A. B. FREYER,
JAMES CRAIG PEACOCK,
Counsel for Petitioner.

January, 1930.

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No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1929

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD.,
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES OF AMERICA

U.S. GOVERNMENT PRINTING OFFICE: 1929

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 118

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD., petitioner

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES OF AMERICA

The United States does not oppose the petition.

One of the questions presented is whether the five-year period of limitations provided by Section 250 (d) of the Revenue Act of 1921 for the determination and assessment of taxes for the year 1918 is set in motion by the filing of a tentative income-tax return or by the subsequent filing of a complete return. The petitioner seeks review of the decision of the Circuit Court of Appeals holding that the statutory period begins to run only from the date of the final or completed return.

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Since the petition for writ of certiorari in the instant case was filed, the Circuit Court of Appeals for the First Circuit has held, in an opinion rendered June 25, 1929, not yet reported, in *White* v. *Hood Rubber Company,* that the statute starts to run with the filing of a tentative return. That decision is, of course, in direct conflict with the decision of the Circuit Court of Appeals in the case at bar.

While we believe the decision of the Circuit Court of Appeals in the instant case is correct, we do not oppose the petition for writ of certiorari because of the conflict of decisions now existing and the importance of the question involved.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.
SEWALL KEY,
BARHAM R. GARY,
Special Assistants to the Attorney General.

JULY, 1929.

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Nos. 118, 414

In the Supreme Court of the United States

OCTOBER TERM, 1929

FLORSHEIM BROTHERS DRY GOODS COMPANY, LTD., PETITIONER

v.

THE UNITED STATES OF AMERICA

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

HOOD RUBBER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE FIFTH CIRCUIT AND THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AND THE COLLECTOR OF INTERNAL REVENUE

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement	3
Summary of Argument	9
Argument:	
I. The period of limitations for the assessment and collection of taxes provided by Section 250(d) of the Revenue Act of 1921 does not begin at the time of the filing of a tentative tax return on Form 1031T	10
II. A tax assessed within the statutory period as extended by waiver and subsequent to the enactment of the Revenue Act of 1924, may be collected, pursuant to Section 278 (d) of that Act, at any time within six years of the assessment	19
Conclusion	22
Appendix	23

CITATIONS

Cases:	
Aiken v. *Commissioner*, decided October 25, 1929 (not yet reported)	20
Bank of Commerce v. *Rose*, 26 F. (2d) 365	21, 22
Boston Hide & Leather Co., Appeal of, 5 B. T. A. 617	11
Botany Mills v. *United States*, 278 U. S. 282	11
Brandon Corporation v. *Jones*, 33 F. (2d) 969	10
Corona Coal & Coke Co. v. *Commissioner*, 11 B. T. A. 240	11
Dallas Brass & Copper Co., Appeal of, 3 B. T. A. 856	10
Greylock Mills v. *Commissioner*, 31 F. (2d) 655	20
Loewer Realty Co. v. *Anderson*, 31 F. (2d) 268	20, 21
L. Loewy & Son v. *Commissioner*, 31 F. (2d) 652	20
Matteawan Manufacturing Co., Appeal of, 4 B. T. A. 953	10, 11
Oak Worsted Mills v. *United States* (C. Cls.), decided December 2, 1929 (not yet reported)	10, 12–17
Paso Robles Mercantile Co. v. *Commissioner*, 33 F. (2d) 653; certiorari denied, October 21, 1929	11, 17
Pilliod Lumber Co. v. *Commissioner*, 7 B. T. A. 591	11
Rasmussen v. *Brownfield-Canty Carpet Co.*, 31 F. (2d) 89	10
Russell v. *United States*, 278 U. S. 181	20
Stange v. *United States* (Ct. Cls.), decided November 4, 1929	22
United States v. *Crooks*, 18 F. (2d) 449	20
Willingham Loan & Trust Co. v. *Commissioner*, decided November 22, 1929 (not yet reported)	17, 18

Statutes: Page

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1075, 1081, 1082, 1083—

Sec. 239 23

Sec. 241 (a) 23

Sec. 227 (a) 23

Sec. 250 (b) (d) 24

Revenue Act of 1921, c. 136, Sec. 250 (d), 42 Stat. 227, 265 .. 24, 25

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 301—

Sec. 277 (a) (2) (U. S. C. Title 26, Sec. 1057) 25

Sec. 278 (c) (U. S. C. Title 26, Sec. 1060) 25

Sec. 278 (d) (U. S. C. Title 26, Sec. 1061) 25, 26

Sec. 278 (e) (U. S. C. Title 26, Sec. 1062) 26

Sec. 280 (U. S. C. Title 26, 1064) 26

Revenue Act of 1926, c. 27, Sec. 278 (d), 44 Stat. 9, 59 (U. S. C. App. Title 26, Sec. 1061) 27

Miscellaneous:

Treasury Regulations 45 (1920 Ed.)—

Art. 443 ..... 27, 28

Art. 444 ..... 28, 29

In the Supreme Court of the United States

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v.

HOOD RUBBER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE FIFTH CIRCUIT AND THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AND THE COLLECTOR OF INTERNAL REVENUE

OPINIONS BELOW

In case No. 118 the opinion of the District Court for the Western District of Louisiana (R. 15–21) is reported in 26 F. (2d) 505, and the opinion of the

Circuit Court of Appeals for the Fifth Circuit (R. 38–40) is reported in 29 F. (2d) 895.

In case No. 414 the opinion of the District Court for the District of Massachusetts (R. 18–20) is reported in 28 F. (2d) 54, and the opinion of the Circuit Court of Appeals for the First Circuit (R. 25–31) is reported in 33 F. (2d) 739.

On December 9, 1929, this Court entered an order advancing case No. 414 to be heard on January 13, 1930, with No. 118 as one case.

JURISDICTION

The judgment of the Circuit Court of Appeals in case No. 118 was entered on December 19, 1928 (R. 40), and petition for rehearing was denied March 1, 1929. (R. 41.) Petition for writ of certiorari was filed May 31, 1929, and certiorari was granted on October 14, 1929. (R. 41.)

The judgment of the Circuit Court of Appeals in case No. 414 was entered June 25, 1929. (R. 31.) Petition for writ of certiorari was filed September 23, 1929, and certiorari was granted October 28, 1929. (R. 31.)

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The two cases present identical questions: (1) Whether the period of limitations for the assessment and collection of taxes provided by Section

250 (d) of the Revenue Act of 1921 begins at the time of the filing of a tentative income tax return on form 1031T; (2) whether an additional tax for the year 1918, assessed within the statutory period as extended by waiver and subsequent to the effective date of the Revenue Act of 1924 may be collected, pursuant to Section 278 (d) of the Revenue Acts of 1924 and 1926, at any time within six years of the assessment.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Treasury Regulations involved are contained in the appendix to this brief.

STATEMENT

The facts in these two cases are substantially the same. In each case a tentative income tax return on form 1031T for the taxable year 1918 was filed, and an extension of time for filing a completed return was granted. Within the extended period a completed return was filed. Before the existing five-year period for the assessment and collection of the tax had expired, a waiver was executed extending the statutory period for one year. Within that six-year period (as reckoned from the filing of the completed return, but more than six years after the filing of the tentative return) and subsequent to the effective date of the Revenue Act of 1924 (June 2, 1924), an assessment was made by the Commissioner. The tax was collected more than six years after the filing of either the tentative or the com-

pleted return, but within six years of the date of the assessment.

In each case claim for refund was filed and rejected and the taxpayer brought action in the District Court to recover the tax on the ground that assessment and collection thereof were barred by the statute of limitations.

THE FLORSHEIM CASE, NO. 118

Prior to March 15, 1919, the taxpayer, a Louisiana corporation, filed a tentative income tax-return for the year 1918. (R. 1, 15.) This return, Form 1031–T, entitled "Tentative return and estimate of corporation income and profit taxes and request for extension of time for filing return" showed merely an estimated tax of $60,000 and the payment therewith of $15,000, one-fourth of that amount. (Exhibit, p. 14, R. 30–31.) An extension of time was granted, and the taxpayer filed its completed return on June 16, 1919. (R. 15, 27, Exhibit, pp. 1–13.)

Under date of March 1, 1924, the taxpayer and the Commissioner of Internal Revenue executed an instrument in the following form (R. 15, 31):

INCOME AND PROFITS TAX WAIVER

Attach.
IT: CA:–2334–6. 1918.

Date: March 1, 1924. 371.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue

Act of 1921, Florsheim Bros. Dry Goods Co. Ltd., of Shreveport, La., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits or war-profits taxes due under any return made by or on behalf of the said Florsheim Bros. Dry Goods for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

[SEAL.] THE FLORSHEIM BROS.
DRY GOODS CO. LIMITED,
Taxpayer.
By SEYMOUR L. FLORSHEIM, *Pres.*

D. H. BLAIR, *Commissioner.*

The additional tax here involved, in the amount of $11,282.15, was assessed on June 10, 1925, and was paid under protest in installments between August 28, 1925, and December 30, 1925. (R. 4, 27,

15–17.) Claim for refund was filed and the taxpayer instituted this action in the District Court for the Western District of Louisiana against the United States, as the Collector by whom the tax was collected was not then in office. (R. 1–12.)

The District Court, sitting without a jury, held that the assessment and collection of the tax were made opportunely and entered judgment for the United States. (R. 15, 21.) The Circuit Court of Appeals affirmed the judgment of the District Court. (R. 40.)

The United States did not oppose the taxpayer's petition for writ of certiorari in this case, but filed a memorandum stating that while the decision of the court below is believed to be correct, it is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *White* v. *Hood Rubber Co.*, 33 F. (2d) 739, on the question of the effect of a tentative return on the period for assessment of taxes.

THE HOOD RUBBER COMPANY CASE, NO. 414

The taxpayer, a Massachusetts corporation, filed a tentative return of its income and excess-profits tax for the year 1918 on form 1031T on March 14, 1919. This instrument, entitled "Tentative return and estimate of corporation income and profit taxes and request for extension of time," showed merely an estimated tax of $300,000 and was accompanied by respondent's check for $75,000, one-fourth of that amount. The time for filing a completed return was

extended and the completed return was filed on July 14, 1919. (R. 14–15.) In the meantime the Commissioner had demanded and the taxpayer had paid a second quarterly installment of $75,000. (R. 15.) Under date of January 26, 1924, the taxpayer and the Commissioner of Internal Revenue executed an instrument in the following form (R. 7, 19):

> JANUARY 26, 1924.
>
> Income and profits tax waiver:
>
> In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921, Hood Rubber Company and affiliated companies, of Watertown, Mass., and the Commissioner of Internal Revenue hereby consent to the determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said companies for the year nineteen hundred and eighteen under the revenue act of 1921, or under prior income, excess-profits, or war-profits tax acts. * * * This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the bureau, within which assessment of taxes may be made for the year or years mentioned.

An additional tax of $39,043.99 was assessed on March 18, 1925, and collected by distraint on December 15, 1926. (R. 15–16.)

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Claim for refund was filed and rejected. (R. 16.) The taxpayer brought action against the Collector in the District Court for the District of Massachusetts to recover the tax on the ground that both the assessment and the collection thereof were barred by the statute of limitations. (R. 2–5.) A trial by jury was waived by written stipulation. (R. 14.) The District Court did not decide whether the period began to run from the filing of the tentative return or from the filing of the completed return, but held that the collection of the tax was barred because the waiver constituted a contract which required that the Government assess and also collect the additional tax within six years after the filing of the return, and that Section 278 (d) of the Revenue Act of 1924 did not enlarge the collection period specified in the waiver. (R. 18–20.) It accordingly entered judgment for the taxpayer. (R. 18.)

On appeal the Circuit Court of Appeals did not consider the point upon which the District Court based its decision, but affirmed its judgment on the other issue, holding that the five year period of limitations began to run at the time of the filing of the tentative return and that both the assessment and collection of the tax were too late. (R. 25–31.) In this case, therefore, the Government is the petitioner before this Court.

SUMMARY OF ARGUMENT

The Revenue Acts, in providing that the period for the determination and assessment of taxes shall begin with the filing of the taxpayer's income tax return, contemplate *the return* required by those Acts. The so-called tentative return filed in these cases by no means meets the requirements of the statute. It does not purport to state specifically the items of gross income and the deductions and credits allowed, but merely contains the taxpayer's estimate of the total tax. Such a return furnishes no information to the Commissioner of Internal Revenue for making an assessment against the taxpayer. That information which furnishes the basis for an assessment is contained only in a completed return, and it follows that the period for assessment should begin to run only from the filing of a completed return.

This being true, the assessment in each of the instant cases was made within the statutory period as extended by waiver and subsequent to the enactment of the Revenue Act of 1924. The period of limitations for the collection of the tax was controlled therefore in case No. 118 by Section 278 (d) of the Revenue Act of 1924 and in case No. 414 by Section 278 (d) of the Revenue Act of 1926, which authorize collection at any time within six years from the date of the assessment. The instrument executed by the taxpayer and the Commissioner of Internal Revenue, pursuant to statute, was merely

a consent in writing to an extension of the existing period of limitations.

ARGUMENT

I

THE PERIOD OF LIMITATIONS FOR THE ASSESSMENT AND COLLECTION OF TAXES PROVIDED BY SECTION 250 (D) OF THE REVENUE ACT OF 1921 DOES NOT BEGIN AT THE TIME OF THE FILING OF A TENTATIVE TAX RETURN ON FORM 1031T.

On the question of whether the period of limitations for the determination, assessment and collection of taxes begins to run from the filing of a tentative return or from the filing of a completed return, there is a conflict of opinion. In the *Hood case* (No. 414), the Circuit Court of Appeals for the First Circuit held that the filing of a tentative return starts the period. This view of the question was also taken in *Rasmussen* v. *Brownfield-Canty Carpet Co.* (C. C. A. 9th), 31 F. (2d) 89 (in which two judges refrained from expressing an opinion on the point), and in *Brandon Corporation* v. *Jones* (E. D. S. C.), 33 F. (2d) 969.

On the other hand, the Circuit Court of Appeals for the Fifth Circuit, in the *Florsheim Case* (No. 118), and the Court of Claims in *Oak Worsted Mills* v. *United States,* decided December 2, 1929 (not yet reported), have held that the period of limitations begins to run only from the filing of a completed return. The same view has been adopted by the Board of Tax Appeals. *Appeal of Dallas Brass & Copper Co.,* 3 B. T. A. 856; *Appeal of Mattea-*

wan Manufacturing Co., 4 B. T. A. 953; *Appeal of Boston Hide & Leather Co.*, 5 B. T. A. 617; *Pilliod Lumber Co.* v. *Commissioner*, 7 B. T. A. 591; *Corona Coal & Coke Co.* v. *Commissioner*, 11 B. T. A. 240.

We submit that the decision of the Circuit Court of Appeals in the *Hood case* is erroneous and that the *Florsheim case* represents the better view.

Section 239 of the Revenue Act of 1918 provides that every corporation shall make a return "stating specifically the items of its gross income and the deductions and credits allowed by this title." The purpose of such a return is to furnish the taxing authorities some basis for making an assessment against the taxpayer. *Paso Robles Mercantile Co.* v. *Commissioner* (C. C. A. 9th), 33 F. (2d) 653 (certiorari denied October 21, 1929). The statute places upon the taxpayer the burden of fixing the time when the period of limitations begins to run in his case. That time is when the return defined by Section 239, *supra*, is filed. Anything short of compliance with the requirements of that section would fail to make a return the return required by the statute. As was said in *Botany Mills* v. *United States*, 278 U. S. 282, 289: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

The tentative return in the form filed disclosed insufficient information to enable the Commissioner to make an assessment, but contained merely the taxpayer's estimate of the total tax. If this were considered the return required by law it would

be impossible for the Commissioner of Internal Revenue to comply with Section 250 (b) of the Revenue Act of 1918, which provides that he shall examine the return and determine whether the correct amount of tax is greater or less than shown. Under the holding of the Circuit Court of Appeals in the *Hood Case,* the filing of a tentative return would set the period of limitations in motion and the five-year period for assessment might well expire, even though the Commissioner had no available information from which to determine the correct amount of the tax.

The views of the Government are well expressed in the following language from the opinion of the Court of Claims in the *Oak Worsted Mills case, supra:*

> The Board of Tax Appeals has consistently held in a number of cases that the filing of the so-called tentative return did not start the running of the statute of limitations. See *Matteawan Mfg. Co.,* 4 B. T. A. 953. In this conclusion we concur for many reasons which will require a review of the proceedings which lead up to the filing of the tentative return, in order to ascertain its purpose and what was understood with reference thereto by both the Bureau of Internal Revenue and the taxpayer. The "revenue act of 1918," was not approved until February 24, 1919. It was quite plain to everyone that large business concerns and individuals hav-

ing large business interests would have great difficulty in filing a return within the time required by law, and the Bureau of Internal Revenue would be deluged with requests for extension of time for filing returns. In fairness to the taxpayers, the most of these applications would have to be granted. The result would be to postpone the payment of taxes in such amount that the Government might become embarrassed for want of revenues, for although the World War was over the Government was still being carried on at an enormous expense. In order to overcome this difficulty a plan was devised which provided the needed funds for the Government and certainly was a valuable concession to the taxpayers who brought themselves within its terms, by granting them an extension of time for filing complete returns. A circular was issued by the commissioner on February 27, 1919, giving the particulars of this plan as follows:

"Income taxpayers, both corporation and individual, were today granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15 to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess-profits returns, provided in every case the taxpayer pays on or before March 15, at least 25% of the estimated amount of the tax due."

It further stated that a supply of blanks for the use of taxpayers would be furnished for making a tentative return, and that the due date for the payment of taxes would not be extended nor would the taxpayer be relieved of interest if the amount paid was short of the amount eventually found due. The blank form furnished to and used by plaintiff was headed, "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," and contained no statement whatsoever showing the gross income, deductions, invested capital, or other details necessary for a proper determination of plaintiff's tax liability. It merely estimated the tax to be $80,000.00 and accordingly $20,000.00 was paid on the taxes. It specifically requested an extension of time for filing the "return" and in this connection we are at a loss to understand what return could possibly be meant except the return required by law. The tentative return was not only not required by the law but there was no provision in the law for it. It was merely an invention of the commissioner and its purpose was to give the taxpayer an extension of time for filing the return required by law and at the same time obtain the needed funds for the Government. The statute (section 250, act of 1918) provided that the tax shall be assessed within five years "after the return was due or was made." What return? The return not authorized by law and not referred to in the statutes? Clearly not. It

was the return which the law required and which was not made by the tentative return. The return on which the statute of limitations is made to depend is the return required by section 239, which is very different from the so-called tentative return. In this connection we have no reference to returns where the taxpayer attempts to comply with the law but through error or mistake does not completely conform to its requirements. We have here a case where there was no pretense as far as making the return was concerned that the law was being complied with. There was merely enough done so that the commissioner would grant the extension of time.

If we look at the matter from the standpoint of equity between the Government and the taxpayer we can come to no other conclusion. The Government had five years in which to make an assessment on a different basis from the return, but surely this ought to be from the time when the taxpayer makes such a return as will enable the bureau to get at least some elementary knowledge as to how much tax he ought to pay. We think no one would contend that the taxpayer could merely file this tentative return and stop there without filing another and completed return but if the contention of the plaintiff is correct and this was a real return in the sense that the word "return" is used in the statute, nothing else was required.

It is argued that if the tentative return was not a return at all but merely an application or an agreement for an extension of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. This argument overlooks the fact that the whole proceeding was a concession to the taxpayer beyond any requirement of the law, for the commissioner might grant or refuse an extension in his discretion, and having that right he could prescribe the terms on which an extension should be granted. The proposition on the part of the commissioner was simply that if the taxpayer would file an estimate of his taxes and a request for extension of time for filing a return and make payment of one-fourth the estimated tax, the extension would be granted, and he had a right to make these requirements.

It is also argued that the Government is taking inconsistent positions; that it says at one time that the tentative return was a return and then when its interests require the contrary, says it is no return, but we find nothing inconsistent in its position. It has at no time stated that the so-called tentative return would be considered as the return required by law. On the contrary, the fact that an extension of time was granted for filing a complete return shows very clearly that it did not so consider it, otherwise no extension of time would have been necessary; and while we do not think it is material what the taxpayer understood, we are

unable to see how it could have understood otherwise. The only meaning given in the dictionary to the word "tentative" which would at all apply to the situation under consideration is "experimental," and while this meaning may apply to some features of the case we are inclined to think that the common or colloquial meaning of the word "tentative" in such situations is with reference to something that will do or will answer for the time being but no further.

For the reasons above stated we concur in the view taken upon this question by the Board of Tax Appeals and by the Circuit Court of Appeals in the case of *Florsheim Bros. Dry Goods Co.* v. *United States,* 29 Fed. (2d) 895, and hold that the limitation did not begin to run until the completed return was filed and that the tax in question was assessed within the period prescribed by the statute.

The decision in the *Paso Robles case, supra,* and of the Circuit Court of Appeals for the Fifth Circuit in *Willingham Loan & Trust Co.* v. *Commissioner,* decided November 22, 1929 (not yet reported), are consistent with the views expressed above. In the *Paso Robles case* the taxpayer kept its books upon the basis of a fiscal year but filed no return covering its fiscal year ended January 31, 1919. It did, however, file a return for the calendar year 1918, which included eleven months of the fiscal year, and a year later it filed a return for the succeeding calendar year. The Circuit Court of

Appeals for the Ninth Circuit held that the period for assessment for the fiscal year ending January 31, 1919, did not begin to run from the date of filing of the first return. Certiorari was denied, No. 406, October Term, 1929.

In the *Willingham Loan & Trust Company case* the taxpayer kept its books on a monthly basis and closed its books on May 31 annually, but it filed returns upon the calendar year basis for the years 1919, 1920 and 1921. The Commissioner of Internal Revenue required returns to be made on the fiscal year basis ending May 31. The Board of Tax Appeals held that the period of limitations began to run from the date of the filing of the last calendar year return covering the period of time included in the respective fiscal years. The Circuit Court of Appeals affirmed the Board upon this point, saying in its opinion:

> On the respective dates of the filing of the returns on the annual basis the Commissioner had before him accurate data upon which to consider deficiencies and make assessments based on the fiscal years. This is not inconsistent with our ruling in *Florsheim Bros. Dry Goods Co., Ltd.*, vs. *United States*, 29 F. (2d) 895, as in that case the taxpayer had first filed a tentative return in which the amount of taxes was estimated and the Commissioner did not have sufficient data before him upon which to make an assessment until the complete return was filed.

The authorities cited by petitioner in the *Florsheim Case* (Br. pp. 28–30, 37–41) holding that the statute of limitations begins to run from the filing of an original return and not from the subsequent filing of an amended return, are clearly distinguishable. In those cases the original return contained sufficient information to enable the Commissioner to make an assessment and constituted a substantial compliance with the statutory requirements. The amended or supplemental return had no statutory recognition, but was filed solely for the purpose of correcting errors and related back to the original return.

II

A TAX ASSESSED WITHIN THE STATUTORY PERIOD AS EXTENDED BY WAIVER AND SUBSEQUENT TO THE ENACTMENT OF THE REVENUE ACT OF 1924, MAY BE COLLECTED, PURSUANT TO SECTION 278 (d) OF THAT ACT, AT ANY TIME WITHIN SIX YEARS OF THE ASSESSMENT

If, as we contend, the period of limitations did not start to run until the filing of the completed return, the assessments in the two cases before the Court were made within the statutory period, as extended by waiver, and subsequent to the effective date of the Revenue Act of 1924 (June 2, 1924). We submit, therefore, that the period of limitations for the collection of these taxes was controlled by Section 278 (d) of the Revenue Act of 1924 in the *Florsheim case* and by the Revenue Act of 1926 in the *Hood case,* each of which provides that

the tax may be collected at any time within six years from the date of the assessment. This view is in accord with the decision of this Court in *Russell* v. *United States,* 278 U. S. 181, and is the view expressly taken by the Circuit Court of Appeals for the Fifth Circuit in the *Florsheim Case* and in *United States* v. *Crooks,* 18 F. (2d) 449, by the Circuit Court of Appeals for the Second Circuit in *Loewer Realty Co.* v. *Anderson,* 31 F. (2d) 268, *Greylock Mills* v. *Commissioner,* 31 F. (2d) 655, and *L. Loewy & Son* v. *Commissioner,* 31 F. (2d) 652, and by the Circuit Court of Appeals for the Eight Circuit in *Aiken* v. *Commissioner,* decided October 25, 1929 (not yet reported).

It seems possible to reach a different conclusion only by accepting the reasoning of the District Court in the *Hood case,* which construed the waiver executed by the Commissioner and the taxpayer as a contract by which the Commissioner agreed to collect the tax within a specified time and which can not be varied by subsequent legislation. (R. 20.) In that case the Circuit Court of Appeals for the First Circuit did not pass upon this point. (R. 26.)

We submit that the waiver is merely a consent in writing, pursuant to statute, to the extension of the statutory period for the assessment of taxes. The Commissioner of Internal Revenue agrees to do nothing and incurs no obligation under the instrument.

In the *Florsheim case*, the Circuit Court of Appeals construed the waiver as follows (R. 40):

> The consent in writing simply served to enlarge the period of limitations and otherwise to leave unchanged the provisions of law relating to collection as well as to determination and assessment of the taxes. The form adopted is in strict compliance with section 250 (d) of the Act of 1921, and it was not intended by that section to authorize an agreement by the commissioner to change the existing rights of the parties. Postponement of the period of limitation was all that was authorized by the law or attempted by the consent in writing.

In the case of *Loewer Realty Co.* v. *Anderson, supra,* the court said (31 F. (2d) 268, 270):

> It is objected that the waiver was without consideration, but the statute requires nothing but a consent, without mentioning consideration, and the taxpayer should not in any event be allowed to repudiate a consent upon which the Commissioner has relied.

In *Bank of Commerce* v. *Rose* (N. D. Ga.), 26 F. (2d) 365, the court said (p. 366):

> But it is now urged that the written consent executed before the passage of the Revenue Act of 1924 was a sort of contractual limitation affecting both the assessment and collection of the tax and limiting both to one year after April 19, 1924. Such a construction can not be given to the paper. No authority has been vested by law in the Commissioner or Collector of Internal Revenue

to bind the government as to limitations, but only an authority to accept the consent or waiver on the part of the taxpayer respecting the limitations that Congress had fixed. On the expiration of the consent, action of the tax officers, if barred, would be barred by virtue of the law and not by force of the contract of waiver. Notwithstanding the waiver, Congress had full power to modify the limitation laws or to repeal them altogether. The taxpayer has no vested right not to pay his taxes because of limitations. The acts of limitation are of grace only. I see nothing in the waiver agreement to prevent application of the act of 1924. The collection was therefore lawfully made.

See also *Stange* v. *United States,* decided by the Court of Claims November 4, 1929 (not yet reported).

CONCLUSION

It is respectfully submitted that the judgment below in the *Florsheim case* (No. 118) should be affirmed and the judgment in the *Hood case* (No. 414) should be reversed.

CHARLES E. HUGHES, JR.,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,
SEWALL KEY,
BARHAM R. GARY,
Special Assistants to the Attorney General.

JANUARY, 1930.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1075, 1081, 1082, 1083, are as follows:

> SEC. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. * * *
>
> SEC. 241. (a) That returns of corporations shall be made at the same time as is provided in subdivision (a) of section 227.
>
> * * * * *
>
> SEC. 227. (a) That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the returns shall be made on or before the fifteenth day of March. The Commissioner may grant a reasonable extension of time for filing returns whenever in his judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.
>
> * * * * *

SEC. 250. (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

* * * * *

(d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. * * *

* * * * *

The pertinent provisions of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, are as follows:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes * * * due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed

within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed * * *

The pertinent provisions of the Revenue Act of 1924 (effective June 2, 1924), c. 234, 43 Stat. 253, 299, 301, are as follows:

SEC. 277. (a) Except as provided in section 278 * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918 * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. Title 26, Sec. 1057.)

* * * * *

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. Title 26, Sec. 1060.)

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be col-

lected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. * * * (U. S. C. Title 26, Sec. 1061.)

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C. Title 26, Sec. 1062.)

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277. (U. S. C. Title 26, Sec. 1064.)

The Revenue Act of 1926, c. 27, 44 Stat. 9, 59 (effective Feb. 26, 1926), provides as follows:

> SEC. 278. (d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. App. Title 26, Sec. 1061.)

Articles 443 and 444 of Treasury Regulations 45 (1920 Ed.) read as follows:

> ART. 443. *Extension of time by collector.*— It is important that the taxpayer render before the return due date a return as complete and final as it is possible for him to prepare. However, in cases of sickness or absence collectors are authorized to grant an extension of not exceeding 30 days, where in their judgment such further time is actually required for the making of an accurate return. See article 1002. The application for such extension must be made prior to the expiration of the period for which the extension is desired. The absence or sickness of one or more officers of a corporation at the time the return is required to be filed will not be ac-

cepted as a reasonable cause for failure to file the return within the prescribed time, unless it is satisfactorily shown that there were no other principal officers available and sufficiently informed as to the affairs of the corporation to make and verify the return. As a condition of granting an extension of time for filing a return the collector may require the submission of a tentative return and estimate of the tax on form 1040–T in the case of individuals, or on form 1031–T in the case of corporations, and the payment of one-fourth of the estimated amount of tax. Where a taxpayer has filed a tentative return and has failed to file a complete return within the period of the extension requested by him the complete return when filed is subject to penalties prescribed for delinquency. Where a tentative return has been filed and no time has been fixed within which a complete return must be filed, the collector may at any time send notice to the taxpayer to file a complete return within a period of time therein specified by him, and a taxpayer who fails to comply with such request will incur the penalties prescribed by statute for delinquency in filing a return.

ART. 444. *Extension of time by Commissioner.*—If before the end of an extension of thirty days granted by the collector an accurate return can not be made, an appeal for a further extension must be made to the Commissioner with a full recital of the causes for the delay. The Commissioner will not grant an additional extension without a

clear showing that a complete return can not be made at the end of the thirty-day period. The Commissioner will grant no such extension beyond the original due date of the third installment of the tax. Either a complete or a tentative return, as complete as possible and giving a ground for assessment of the tax, must be submitted on or before the due date as extended, and the tax shown to be due must be paid with the submission of the return. If a complete return can not be made at that time, the facts must be submitted to the Commissioner for such further action as he deems warranted. In exceptional circumstances the taxpayer may apply originally to the Commissioner for an extension of time.

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Nos. 118, 414

In the Supreme Court of the United States

OCTOBER TERM, 1929

FLORSHEIM BROTHERS DRY GOODS COMPANY, LTD., PETITIONER

v.

THE UNITED STATES OF AMERICA

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

HOOD RUBBER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUBMITTED AFTER THE HEARING

INDEX TO APPENDIX

	Page
Statutes:	
Section 1309 of the revenue act of 1918	7
Section 3182, Revised Statutes	7
Regulations:	
Article 1012 of Treasury Regulations 45 (1920 ed.)	7
Miscellaneous:	
Letter from commissioner to collectors dated February 13, 1919	8–10
Letter from commissioner to collectors dated February 27, 1919	11–12
Telegram from commissioner to Lewellyn, collector, dated March 21, 1919	12
Letter from commissioner to collectors, dated April 14, 1919	13–14
Extract from Internal Revenue Manual, 1920	14–15
Letter from commissioner to collectors, dated October 3, 1919	16
Extract from opinion of Solicitor of Internal Revenue, dated March 17, 1920	16–18
Extract from letter from commissioner to collectors, dated August 13, 1924	18
Letter from commissioner to collectors dated May 5, 1919	19

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 118

FLORSHEIM BROTHERS DRY GOODS COMPANY, LTD., petitioner

v.

THE UNITED STATES OF AMERICA

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

HOOD RUBBER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUBMITTED AFTER THE HEARING

The purpose of this memorandum is to answer certain suggestions which were made during the course of the argument, chiefly as to the effect of the tentative returns on form 1031–T.

I

It was suggested that if the Commissioner made assessments based merely on the tentative returns, such returns might be considered as the returns required by the statute.

In neither of the instant cases does the record show that any assessment was made on the basis of the tentative return. As a matter of fact, the practice of the Commissioner was not to make assessments on the basis of tentative returns, and we are informed by persons who were employed in the Bureau of Internal Revenue in 1919, and who are still so employed, that the Commissioner did not make assessments of taxes for the calendar year 1918 until after the expiration of the time for filing completed returns, as extended. If this practice was departed from in some cases, it was only because of inadvertence. Evidently the Collectors were instructed not to list tentative returns except where it was found impossible to secure a final return. (See extract from Sections 627 and 628, Internal Revenue Manual, Part II, published 1920, pp. 14–15, *infra.*) Just when these Instructions were issued we are unable to ascertain. Cf. Letter of May 5, 1919, p. 19, *infra.*

Assessments could be made only by the Commissioner. (See R. S. 3182; *Fidelity Trust Co.* v. *Commissioner,* 10 B. T. A. 482, 487.) An assessment is made by the signing of an assessment list. This list is prepared in the first instance by the Collector, and forwarded to the Commissioner. (See Article

1012, Treasury Regulations, pp. 7–8, *infra.*) The Commissioner, on August 13, 1924, stated in a circular letter to Collectors of Internal Revenue: "An assessment is made on the date when the assessment list is signed by the Commissioner." (See letter of August 13, 1924, p. 18, *infra.*)

II

It was suggested that the fact that the Collector sent a memorandum in regard to the second instalment of the tax to the Hood Rubber Company showed that the Government treated the tentative return as a sufficient basis on which to make a demand for the payment of taxes.

The memorandum referred to, dated June 16, 1918, is copied in R. 17 of the *Hood case,* No. 414 (and there by typographical error dated June 16, 1919. See R. 15). It emanated merely from the Collector, and it does not show that the Government had then determined the amount of the tax due. As shown in the agreed statement of facts, this related merely to the second instalment of the amount of tax shown by the tentative return. (R. 15.) At the time when this was sent out, the final return had not been filed. This was filed July 14, 1919. (R. 15.)

We submit that no significance attaches to this so-called "demand." One of the conditions upon which the extension of time for filing the completed return was granted was that the taxpayer should pay the estimated tax. (See letters of the Commis-

sioner of February 13 and 27, 1919, pp. 9, 12, *infra.*) The fact that payment of the first instalment accompanies the filing of any return shows that assessment of the tax does not necessarily or ordinarily precede collection. The notice to the Hood Rubber Company dated June 16, 1918, is similar to the statement on form 1031–T that one-fourth of the estimated tax must reach the Commissioner's Office on or before March 15, 1919. Both are based solely upon taxpayer's tentative return of his tax, and neither indicates that the tax has been assessed or that the tentative return has been treated as fulfilling the requirements of a completed return.

III

During the argument there was some discussion as to the effect of the procedure adopted upon the imposition of a penalty for failure to make a return on time.

Under the procedure adopted it seems to have been contemplated that this would be imposed only for failure to make the completed return within the time as extended. The mere filing of the tentative return did not operate to relieve the taxpayer of this penalty. The provisions of Article 407 of Regulations 45, quoted on pp. 25–26 of petitioner's brief in the *Florsheim case,* No. 118, do not apply to form 1031–T, but to "a statement made by taxpayer disclosing his gross income and the deductions therefrom" on a form other than the regular printed form. A letter of October 3, 1919, from

the Commissioner to the Collectors, shows that the Commissioner contemplated that a failure to file the completed return would involve the imposition of a penalty even if the taxpayer had filed a tentative return on form 1031–T. (See p. 16, *infra.*)

IV

Further evidence of the fact that the Government did not regard the tentative return on form 1031–T as taking the place of the completed return is found in the fact that the Solicitor of Internal Revenue ruled that a tentative return on form 1031–T made after the passage of the Revenue Act of 1918 is not "a return" within Section 250 (b) of the Act imposing a penalty on false or fraudulent understatements made with intent to evade the tax. (See extract from opinion of March 17, 1920, pp. 16–18, *infra.*)

V

It was suggested during the argument that, regardless of the effect of the tentative return, the period of limitations should should start to run from March 15, 1919, because Section 250 (d) of the Revenue Act of 1918 provided that the "amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return *was due or was made.*" The question as to the effect of the words *was due* is immaterial in these cases. The five-year period, even calculated from March 15, 1919, had not expired

when the Revenue Act of 1921 took effect, as of January 1, 1921 (42 Stat. 227, 271). Section 250 (d) of the 1921 Act provided that the amount of taxes due under prior tax Acts "shall be determined and assessed within five years after the return *was filed.*" Section 277 (a) (2) of the Revenue Act of 1924 contained the same language. (The section of the 1924 Act which operates in the instant cases is not Section 277 (a) (2), but 278 (c) and (d)). (The sections in the Revenue Acts of 1918, 1921, and 1924 herein referred to are copied on pp. 23–26 in the Appendix to the Government's original brief in the instant cases.)

Extracts from all statutes, regulations, and other departmental documents throwing any light upon the questions herein discussed which we have been able to find (except those mentioned in our brief) are printed as an appendix hereto.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

JANUARY, 1930.

APPENDIX

STATUTES

Section 1309 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1143 (approved February 24, 1919), provides in part as follows:

> That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

Section 3182 of the Revised Statutes provides:

> The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties * * * and shall certify a list of such assessments when made to the proper collectors respectively, * * *.

REGULATIONS

Article 1012 of Treasury Regulations 45 (1920 ed.) provides:

> *Assessment of tax.*—When the returns are received at the collectors' offices, they are examined and listed before being forwarded to the Commissioner. If it appears that the tax is greater or less than shown in the return, it is recomputed. After checking the figures the Commissioner assesses the tax on the basis of the collectors' lists. The collectors then send out bills for the taxes, either as computed by the tax-

payer or as recomputed. If a taxpayer believes that he has been overassessed, he may file a claim for abatement or (after payment of the tax) for a refund of the excess. See section 252 of the statute and articles 1031–1038. As soon as practicable the returns are carefully audited by accountants in the office of the Commissioner at Washington, assisted where necessary by reports of the examination of taxpayers' books and records made by revenue agents in the field. If error in a return is detected, the taxpayer is notified accordingly and an additional assessment is made against him or he is given the opportunity to file a claim for a refund, as the case may be. Any assessment must be made within five years after the return was due or was made, except in the case of false or fraudulent returns with intent to evade the tax. See sections 228, 1305 and 1318 of the statute and articles 451 and 1711.

LETTER FROM COMMISSIONER TO COLLECTORS DATED FEBRUARY 13, 1919

To Collectors of Internal Revenue and others concerned:

Although no general extension of time will be authorized for filing Federal Income Tax returns due March 15, the Commissioner of Internal Revenue has approved a novel feature of tax collection which will serve for all practical purposes as a possible extension of forty-five days for the filing of corporation income and excess profits tax returns in cases where corporations are unable to complete and file their returns of March 15.

If a corporation finds that, for good and sufficient reason, it is impossible to complete

its return by March 15, it may make a return of the estimated tax due and make payment thereof not later than March 15. If meritorious reason is shown as to why the corporation is unable to complete its return by the specified date, the collector will accept the payment of the estimated tax and agree to accept the revised and completed tax return within a period of not more than 45 days.

Under the plan adopted for corporation payments and returns, the Government will be able to collect approximately the amount of tax due on or before March 15, thus meeting its urgent needs, and corporations actually requiring further time for the preparation of their complete returns will be granted ample time in which to do so.

One of the advantages of this plan is that it relieves the taxpayer of one-half of one per cent interest per month that would be attached to the payment of the taxes under an extension granted at the request of the taxpayer. The taxpayer will, of course, not be relieved of interest on such amount as his payment may fall short of the tax found later to be due on the basis of his final return.

Should the payment on March 15 of the estimated tax due be greater than the tax eventually found to be due on examination of the completed return the excess payment will automatically be credited to the next installment which will be due on June 15.

Provision for systematically handling this new feature will be made in the construction of the new return blanks for corporations.

The new form will be a combined income and excess profits blank, embodied in which

is a detachable letter of remittance. Any corporation which finds that, for sufficient reasons, it can not complete its return by March 15, may detach and fill out the letter of remittance, and forward same to the collector on or before March 15, together with a check, money order or draft for the tax due on that date. If the exact tax is not known the estimated tax due will be paid in this manner. A statement in writing of the reasons why it is impossible for the corporation to complete the return by the specified date must accompany every such remittance.

Individual taxpayers will be given similar privileges in cases in which it is made clear by the taxpayer that the time available is not sufficient to enable him to complete his return by March 15. No reason exists, according to the Internal Revenue officials, for delaying the filing of the returns of individual incomes, except in unusually difficult cases.

Forms for returns of individual incomes up to $5,000 will be distributed by collectors within a few days. Forms for larger incomes will be available about February 24. Corporation blanks will be distributed March 1. Regulations governing the administration of the new Income Tax will also be available before March 1.

DANIEL C. ROPER,
Commissioner of Internal Revenue.

FEBRUARY 13, 1919.

LETTER FROM COMMISSIONER TO COLLECTORS DATED FEBRUARY 27, 1919

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C.

Income taxpayers both corporations and individual, were to-day granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15, to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess profits returns, provided in every case the taxpayer pays on or before March 15 at least 25% of the estimated amount of the tax due.

A supply of blanks of Form 1040–T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of Internal Revenue to-day. Collectors will furnish this Form to any individual requesting an extension of time for the filing of his complete return for 1918.

The tentative return to be used by corporations who make payment of the estimated tax due on or before March 15 is being printed, and a supply will be forwarded to-morrow to each collector, who will mail these Forms to every corporation on his list. (To be known as Form 1031–T.)

Under the estimated tax procedure, which is now available to every taxpayer under the Income and Excess Profits Section of the New Revenue Law, there is no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.

It is urged by the Bureau that the estimates be computed on the most exact basis

available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return the excess payment will be automatically credited against the next installment, which will be due June 15.

The taxpayer will not be relieved, however, under this plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return.

Commissioner Daniel C. Roper, in announcing the further relief for taxpayers in the matter of completing their returns, stated that he believed the plan is not only simple and workable, but adequately protects the interests of the taxpayer and the Government.

February 27, 1919.

TELEGRAM FROM COMMISSIONER TO LEWELLYN, COLLECTOR, DATED MARCH 21, 1919

WASHINGTON, *March 21, 1919.*

LEWELLYN,

Collector, Pittsburgh, Pa.:

Tentative corporation and individual returns forms ten forty T and ten thirty one T should be retained in collector's office until complete returns are filed at which time tentative return should be attached to complete return and forwarded with assessment list twenty three stop Complete return will form basis of assessment stop Checks which accompany tentative returns should be detached and deposited immediately upon their receipt.

ROPER, *Commissioner.*

LETTER FROM COMMISSIONER TO COLLECTORS DATED APRIL 14, 1919

EXTENSION OF TIME FOR COMPLETING CORPORATE RETURNS AND FOR FILING CERTAIN RETURNS NOT THE BASIS FOR ASSESSMENT OF TAX

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., April 14, 1919.

To Collectors of Internal Revenue:

In view of the short time between the date on which forms were available and the due date (March 15th) of calendar year returns required under the Revenue Act of 1918, notice was given through the public press and otherwise that tentative returns (Forms 1031T and 1040T), accompanied by a first instalment of one-fourth of the estimated tax due, would be accepted on that date, and that in such cases forty-five days would be given in which to file complete returns, but that interest at the rate of one-half of 1% per month upon the amounts by which such instalment payments fell short of the correct amounts would be collected.

In the case of corporations which filed Form 1031T on or before March 15th, a further extension, where needed, to June 15, 1919, in which to file complete returns on Form 1120 is hereby granted, but all such corporations will be required to pay on or before June 15th a sum sufficient, with the amount paid on March 15th, to equal one-half the tax due as shown by the return on Form 1120, together with interest at the rate of one-half of 1% per month on any deficiency in the first instalment.

It is not deemed necessary to grant an extension of time beyond the 45 days originally granted for the completion of personal returns, except on special request therefor for sufficient reasons given, but the above ruling as to interest on deficient instalments applies to them.

An extension of time in which to file returns of corporations making returns for a fiscal year ended either on January 31, or February 28, 1919, will on request be granted to June 15, 1919, but such extension shall not operate to extend the due date of any instalment of tax after the first. Interest at the rate of one-half of 1% per month will be collected from the time the first instalment would have been payable if the extension had not been requested.

The time for filing returns of information (Forms 1096 and 1099), fiduciary returns (Form 1041), withholding returns (Form 1042 accompanied by Form 1098 and Form 1013), returns of partnership and personal service corporations required to file returns on a calendar year basis, and all other returns required under the income tax and profits tax provisions of the law, which are not the basis for the assessment of the tax, is also extended to June 15, 1919.

DANIEL C. ROPER,
Commissioner.

EXTRACT FROM INTERNAL-REVENUE MANUAL FOR THE INFORMATION AND GUIDANCE OF COLLECTORS AND THEIR EMPLOYEES

The following appear in Part II (which was printed in 1920, but we are unable to ascertain when these instructions were first issued):

SEC. 627. Tentative returns may be accepted from taxpayers when properly authorized. When the tentative returns are received the amount collected should be taken up in the division of the unidentified collection account to be known as 9c, but classified for deposit as income tax. Tentative returns should not be listed, but for purposes of control may be numbered from zero up and placed in a suspended file. If any large quantities are received, stencils should be cut for the purpose of preparing an index file for cross reference. As the final returns are received the tentatives will be withdrawn from the suspended file and firmly attached to the final. The finals will be numbered in accordance with the regular current monthly series in which they are listed. They will not take the number previously assigned to the tentative return. Upon receipt of the final the amount of tax declared by the taxpayer should then be listed and the taxpayer credited with the amount paid on filing the tentative. At the same time the unidentified collection account 9c should be debited and taxes collectible credited.

SEC. 628. The file of tentative returns should be frequently reviewed and if the finals are not received within the time limit allowed communication should be had with the taxpayer and the final secured. If it is found impossible for any reason to secure a final return for which a tentative was filed, the tentative may be listed as a return paid in full. If the latter procedure becomes necessary, full information setting forth all the facts in the case should be attached to the return and forwarded to the bureau.

LETTER FROM COMMISSIONER TO COLLECTORS DATED OCTOBER 3, 1919

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., October 3, 1919.

To Collectors of Internal Revenue:

In order that all returns required by Titles II and III of the Revenue Act of 1918 for the year 1918 may be immediately available for audit in this office, it is absolutely necessary and essential that such returns be forwarded to this office at the earliest practicable date.

It has been brought to the attention of the office that a number of taxpayers who filed tentative returns or who have been granted an extension from the Commissioner in which to file completed return, have not done so. You will, therefore, immediately notify every taxpayer in your district whose return is due, and who has not filed a completed return, except those who have received an extension of time which has not expired, that unless a completed return is filed within ten days from date of your notice, the 25% penalty will attach.

This matter is of vital importance to this Bureau and these notices should be issued immediately upon receipt of this letter.

DANIEL C. ROPER,
Commissioner.

EXTRACT FROM OPINION OF SOLICITOR OF INTERNAL REVENUE, DATED MARCH 17, 1920

MARCH 17, 1920.

COMMISSIONER OF INTERNAL REVENUE.
(Attention of Committee of Appeals and Review.)

The question has been raised as to whether Goodman, Wallach & Helber, 113

W. Baltimore St., Baltimore, Md., has made false or fraudulent returns of the corporation income tax for the year 1918 and, if so, what penalties shall be enforced.

* * * * *

The tentative return made on Form 1031–T, which shows only the amount of the estimated tax and is to be accompanied by 25 per cent of the estimated tax, is authorized by Regulations No. 45, Article 443, and may be required by the Collector as a condition of granting an extension of time. No other figures need be shown in the tentative return and it would not be possible for the Commissioner to determine from an examination of it, as provided in Section 250 (b), whether the amount of the tax is correctly stated. It seems clear that the tentative return is not the complete return to which Section 250 (b) refers and I am of the opinion that the penalties of Section 250 (b) are not applicable to false or fraudulent statements made on Form 1031–T.

* * * * *

It is therefore held that:

(1) A tentative return on Form 1031–T made after the passage of the Revenue Act of 1918 is not "a return" within Section 250 (b) of the Act imposing a penalty on false or fraudulent understatements made with intent to evade the tax.

(2) The deduction of "employees' bonuses" which it is intended shall not be paid and which it is stated will never be paid, and of salaries which during a period of four months have been increased by 400 per cent, apparently to decrease profits (although without the increase they exceeded the average salary paid by corporations doing similar business), constitutes evidence sufficient to prove "a false or fraudulent

understatement with intent to evade the tax" within Section 250 (b) of the Revenue Act of 1918.

WAYNE JOHNSON,
Solicitor of Internal Revenue.

Approved.

WM. WILLIAMS,
Commissioner of Internal Revenue.

Noted.

P. S. TALBERT,
Chairman Committee on Appeals and Review.

EXTRACT FROM LETTER FROM COMMISSIONER TO COLLECTORS, DATED AUGUST 13, 1924

TAXES ASSESSED AFTER THE ENACTMENT OF THE REVENUE ACT OF 1924

If income, excess-profits or war-profits taxes imposed by the Revenue Acts of 1916, 1917, 1918, or 1921 are assessed after the enactment of the Revenue Act of 1924, they are to be computed, either as deficiency, or as interest, penalty, or other addition to the tax, as if the Revenue Act of 1924 had not been enacted, but they are to be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of income taxes imposed by the Revenue Act of 1924. (See Section 280 of the Revenue Act of 1924.)

It is, therefore, necessary in the case of taxes imposed by the Revenue Acts of 1916, 1917, 1918, or 1921 to determine the date of assessment for the purpose of ascertaining whether or not the provisions of the Revenue Act of 1924 are applicable to the particular case. An assessment is made on the date when the assessment list is signed by the Commissioner.

LETTER FROM COMMISSIONER TO COLLECTORS DATED MAY 5, 1919

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., May 5, 1919.

COLLECTORS OF INTERNAL REVENUE:

Office Procedure No. VIII, dated April 26, 1919, instructs Collectors of Internal Revenue to forward to this office with tentative assessment list April 30th all final returns filed by that date and to repeat the operation May 31st.

You will please advise this office by *return mail* the approximate number of returns, Form 1040, and the approximate number of returns, Form 1120, which will accompany your April 30th list. On May 31st you will give like advice relative to the May 31st list.

DANIEL C. ROPER,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1930

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

HOOD RUBBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1929
CERTIORARI GRANTED OCTOBER 28, 1929

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

HOOD RUBBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., First Circuit	1	1
Caption (omitted in printing)	1	1
Record from D. C. U. S., District of Massachusetts	1	1
Writ of attachment	1	1
Officer's return on writ	2	1
Declaration	3	2
Exhibit A, tentative income-tax return	8	5
Exhibit B, income and profits tax waiver	11	7
Exhibit C, protest	12	8
Exhibit D, claim for refund	13	8–12
Exhibit E, rejection of claim for refund	20	13
Answer	21	14
Waiver of jury trial	22	14
Agreed statement of facts	22	14
Minute entry of hearing	27	17
Motion for entry of judgment forthwith	27	18
Judgment	28	18
Opinion, Lowell, J	28	18
Defendant's bill of exceptions and order settling same	31	21
Petition for appeal	35	23
Assignment of error	36	24
Citation on appeal and acknowledgment of service thereof (omitted in printing)	37	24
Certificate of clerk (omitted in printing)	38	24
Memorandum re order of enlargement of time	38	24
Opinion, Bingham, J	39	25
Argument and submission (omitted in printing)	47A	31
Judgment	47A	31
Clerk's certificate (omitted in printing)	47A	31
Order allowing certiorari	49	31

1 In United States District Court, District of Massachusetts

[Caption omitted.]

No. 3229, Law Docket.

HOOD RUBBER COMPANY, PLAINTIFF

v.

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Writ of attachment

Filed Jan. 18, 1928

[SEAL.] MASSACHUSETTS DISTRICT, *ss*:

The President of the United States of America to the Marshal of Our District of Massachusetts, or His Deputy, Greeting:

We command you to attach the goods or estate of Thomas W. White, as he is collector of internal revenue for the district of Massachusetts, of Boston, in our District of Massachusetts,
2 defendant to the value of seventy-five thousand ($75,000) dollars, and summon the said Thomas W. White (if he may be found in your district) to appear before our judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the 3rd Tuesday of March, 1928; then and there, in our said court to answer unto Hood Rubber Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts and having its usual place of business in Watertown, in said Commonwealth, plaintiff.

In an action of contract or tort.

To the damage of the said plaintiff (as it says) the sum of seventy-five thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ with your doings therein.

Witness the honorable James M. Morton, jr., at Boston, the twelfth day of January, in the year of our Lord one thousand nine hundred and twenty-eight.

JOHN E. GILMAN, Jr.,
Deputy Clerk.

Officer's return on writ

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *January 12, 1928.*

Pursuant hereunto I have this day attached a chip as the property of the within-named defendant, Thomas W. White, and thereafter

on the same day I summoned the within-named defendant, Thomas W. White, to appear at court and answer as herein directed by giving to him in hand at Boston, in said district, an original summons to this writ.

WILLIAM J. KEVILLE,
U. S. Marshal,
By RALPH D. SAWIN, *Deputy.*

Travel .06
Service 2.00

2.06

3 In United States District Court

Declaration

Filed January 18, 1928

The plaintiff says:

1. That it is a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its usual place of business in Watertown, in the county of Middlesex and said Commonwealth.

2. That the defendant, Thomas W. White, on the fifteenth day of December, 1926, being the date of the wrongful and illegal acts herein complained of, was and still is the collector of internal revenue for the district of Massachusetts.

3. That on the fourteenth day of March, 1919, the plaintiff filed with the then collector of internal revenue for the district of Massachusetts its income and excess-profits tax return for the calendar year 1918, upon the form prescribed and furnished by the Commissioner of Internal Revenue; that said return contains the following:

"Form 1031 T—Tentative return and estimate of corporation income and profits taxes and request for time for filing return."

A copy of said return is hereto annexed, marked "A," and made a part of this declaration.

4. That said return as filed showed that the plaintiff estimated the taxes due to amount to three hundred thousand dollars ($300,000), and at the time said return was filed a payment of seventy-five thousand dollars ($75,000) was made, being one-quarter of the estimated amount of said tax and being the first installment required to be paid at the time of the filing of said return under the provisions of the revenue act of 1918, then in force and effect.

5. That on said return, above referred to and annexed hereto
4 as A, appears under the heading "Collector's approval" the statement that "the time for filing the completed return of the taxpayer" was extended to April 29, 1919, which time for filing said completed return was thereafter again extended to July 14, 1919, and that said approval was duly executed by the then collector of internal revenue for the district of Massachusetts.

6. That between said March 14, 1919, and June 16, 1919, the plaintiff received from the then collector of internal revenue a demand for payment of the second instalment of the taxes shown to be due by the return herein referred to and marked "A" and amounting to seventy-five thousand dollars ($75,000), and on June 16, 1919, the plaintiff, in consequence of this demand, paid to said collector a second sum of seventy-five thousand dollars ($75,000).

7. That on July 14, 1919, the plaintiff filed a completed income and excess-profits tax return, from which it appeared that the total tax due from the plaintiff for the calendar year 1919 was one hundred sixty-nine thousand seven hundred seventy-two dollars and sixty-five cents ($169,772.65), of which amount one hundred fifty thousand dollars ($150,000) had been paid on March 14, 1919, and June 16, 1919, as above set forth, leaving a balance due of nineteen thousand seven hundred seventy-two dollars and sixty-five cents ($19,772.65), which amount was paid in full on December 12, 1919.

8. That on January 26, 1924, the plaintiff and the Commissioner of Internal Revenue, acting for the United States, entered into an agreement entitled "Income and profits tax waiver," a copy of which is hereto annexed, marked "B," and made a part of this declaration, said waiver being executed and filed in accordance with the provisions of section 250 (d) of the revenue act of 1921; that said waiver stipulated that the parties thereto consented "to a determination, assessment and collection of the amount of income * * * taxes due under any return made by or on behalf of said companies (meaning the plaintiff and its subsidiaries) for the year 1918 under the revenue act of 1921 or under prior * * * tax acts * * * for a period of one year after the expiration of the statutory period of limitations."

9. That thereafter it was determined by the Commissioner of Internal Revenue that there was due from the plaintiff additional taxes for the calendar year 1918 amounting to two hundred forty-nine thousand one hundred thirty-one dollars and ninety-six cents ($249,131.96), and the plaintiff was notified of said determination on February 16, 1924. As a result of information furnished by the plaintiff this amount was reduced to one hundred ninety-one thousand nine hundred seventy-eight dollars and ninety-eight cents ($191,978.98), which amount was on March 18, 1925, assessed to the plaintiff as additional income and excess-profits taxes for the calendar year 1918.

10. That the plaintiff thereupon filed a request for an abatement of the amount so assessed, alleging the same to have been illegally and erroneously assessed, and furnished information to substantiate its allegation; that said request for abatement being considered, it was thereupon determined that there was due from the plaintiff for said additional taxes and interest the sum of forty-nine thousand four hundred five dollars and thirty-four cents ($49,405.34); that a credit of ten thousand three hundred sixty-one dollars and thirty-five cents ($10,361.35) having previously been allowed the plaintiff

as an over-assessment of its taxes for the year 1919, said amount was deducted from said sum of forty-nine thousand four hundred five dollars and thirty-four cents ($49,405.34), leaving as the balance alleged to be due from the plaintiff the sum of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99).

11. That the plaintiff refused to pay said amount for
6 the reasons set forth in its claim for refund hereinafter referred to and that thereupon a warrant of distraint issued for the collection of said amount; that acting under the direction of the defendant herein and under color of said warrant of distraint, on December 15, 1926, a deputy marshal of the United States levied on and seized money of the plaintiff to the amount of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), then being in the Union Market National Bank in Watertown aforesaid and thereupon paid said money over to the defendant, returning said warrant of distraint as satisfied in full.

12. That the plaintiff upon receipt of notice that its property had been so levied on and seized, as above set forth, on December 15, 1926, filed with the defendant a formal protest and demand for the return of said property, all as set forth in its letter of December 15, 1926, a copy of which is hereto annexed, marked "C," and made a part of this declaration.

13. That the defendant, having refused to return said property as demanded, the plaintiff on or about January 15, 1927, filed with the defendant as collector of internal revenue for the district of Massachusetts a claim for refund of the amount of said additional taxes and interest of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), alleging the same to have been illegally collected and illegally assessed, said claim being based on the following contentions:

(1) That the proceeding for the collection of said additional taxes was begun and the collection of said taxes was made after five (5) years from the date when the return for the year 1918 was filed and after the time fixed by the waiver hereinbefore referred to, and that said alleged additional taxes did not on December 15, 1926 (the date on which plaintiff's property was seized), constitute a tax due
7 from the plaintiff, because the collection thereof was barred by the provisions of the revenue act of 1921, section 250 (d), providing as follows:

"The amount of income, excess profits of war profits taxes due * * * under prior income, excess profits or war profits tax acts * * * shall be determined and assessed within five years after the return was filed, unless the commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes due under * * * prior income, excess profits or war profits

tax acts * * * shall be begun after the expiration of five years after the date when the return was filed * * *."

(2) That the return filed by the plaintiff on March 14, 1919, and treated by the taxing authorities as the basis for the collection of taxes amounting to one hundred fifty thousand dollars ($150,000) is "the return" required by the revenue act of 1918, and sets the statute of limitations running; that said return having been filed as of March 15, 1919, an assessment within the limitation period should have been made before March 15, 1924, which period was extended by the waiver to March 15, 1925; that said tax was assessed on March 18, 1925, three (3) days after the limitation period had expired.

A copy of said claim for refund is hereto annexed, marked "D," and made a part of this declaration.

14. That on November 3, 1927, the Commissioner of Internal [sic] in his official capacity rejected said claim for refund, as appears in the letter from the commissioner, a copy of which is hereto annexed, marked "E," and made a part of this declaration.

8 15. That because of the facts herein set forth said additional taxes and interest of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99) were illegally assessed and illegally collected and were not due from the plaintiff when its property was illegally levied on and seized by the defendant.

Wherefore the plaintiff prays judgment against the defendant for the sum of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), together with interest from December 15, 1926, and for costs.

HOOD RUBBER COMPANY, *Plaintiff.*
By FREDERIC C. HOOD, *President.*

HAROLD C. HASKELL,
Attorney for Plaintiff.

[*Duly sworn to by Frederic C. Hood; jurat omitted in printing.*]

Exhibit A to declaration

404831. Duplicate (to be sent to collector with original).
Form 1031–T—United States Internal Revenue Service.

TENTATIVE RETURN AND ESTIMATE OF CORPORATION INCOME AND PROFITS TAXES AND REQUEST FOR EXTENSION OF TIME FOR FILING RETURN

9 Hood Rubber Co. and subsidiaries, as per list on back of report, Watertown, Massachusetts.

3rd Mass. field dept., Mar. 14, 1919, coll'r. int. rev.

This form, duly approved by the collector, must accompany the taxpayer's completed return when filed.

Penalties:

For making false or fraudulent returns, not exceeding $10,000 or not exceeding one year's imprisonment, or both, in the discretion of the court, and, in addition, 50 per cent of the tax evaded.

For failing to make return on time, not more than $1,000, and, in addition, 25 per cent of the amount of tax due.

Date MARCH 11, 1919. No.——

(To be entered by taxpayer.) (To be entered by collector.)

COLLECTOR OF INTERNAL REVENUE,

Boston, Mass.

The amount stated below is remitted herewith in payment of not less than one-fourth of the estimated amount of the income, war-profits, and excess-profits taxes for the year ended December 31, 1918, of the corporation whose name and address appear at the head of this form.

An extension of 45 days in the time allowed for filing a completed return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

No forms or regulations as yet received, so unable to complete figures.

NOTE.—A parent company may make a tentative return and pay the first installment of the tax on behalf of all its subsidiaries without apportioning the tax among them until the completed return is filed.

Estimated amount of tax	00
Amount of remittance herewith	$300,000.100

[Across the face of this form is written:] "Paid under protest."

Check or draft	Money order	Currency or coin	Certificate of indebtedness	Total
$75,000.—	$————	$————	$————	$75,000.—

Collector's approval

In consideration of the filing of this tentative return and the payment of not less than one-fourth of the estimated amount of the tax, and for the reasons stated above, the time for filing the completed return of the taxpayer whose name and address appear at the head of this form is hereby extended, by authority of the Commissioner of Internal Revenue, until April 29, 1919.

If the remittance accompanying this tentative return exceeds one-fourth of the tax as computed on the completed return, the excess will be credited against the balance remaining to be paid. If the remittance is less than one-fourth of the tax, the balance due, with interest at the rate of six per cent per annum from March 15, 1919,

must accompany the completed return. If the amount paid exceeds the total tax as shown by the completed return, the excess will be refunded.

Date, March 25, 1919.

(Signed) JOHN F. MALLEY,
Collector of Internal Revenue,
3rd District of Massachusetts.

Hood Rubber Company subsidiaries

Arrow Rubber Company, Boston, Mass., #1504376.
Capital City Rubber Company, Columbus, Ohio.
Dearborn Rubber Company, Chicago, Ill.
East Watertown Realty Company, Watertown, Mass.,
11 #1751020.
Grand Rapids Shoe & Rubber Company, Grand Rapids, Mich.
Hood Tire Co., Inc., Watertown, Mass., #1751054.
Iowa Rubber Shoe Company, Davenport, Iowa.
Massachusetts Rubber Company, Watertown, Mass., #1504378.
Old Colony Rubber Company, Watertown, Mass., #1504375.
Pilgrim Rubber Footwear Co., Boston, Mass., #1504379.
Shawmut Rubber Co., Watertown, Mass., #1504377.
Shawmut Tire Co. of New York, Inc., New York, N. Y.
Midwest Rubber Shoe Co., Omaha, Nebr.

Exhibit B to declaration

IT:CR:E. JHLT. JANUARY 26, 1924.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921, Hood Rubber Company and affiliated companies, of Watertown, Mass., and the Commissioner of Internal Revenue hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said companies for the year nineteen hundred and eighteen under the revenue act of 1921, or under prior income, excess-profits, or war-profits tax acts, or under section 38 of the act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period or limitation, or the statutory period of limitation as extended
12 by any waivers already on file with the bureau, within which assessments of taxes may be made for the year or years mentioned.

HOOD RUBBER COMPANY, *Taxpayer.*
By FREDERIC C. HOOD, *President.*
D. H. BLAIR, *Commissioner.*

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Exhibit C to declaration

DECEMBER 15, 1926.

THOMAS W. WHITE, Esq.,
Collector of United States Internal Revenue,
Park Square Building, Boston, Massachusetts.

DEAR SIR: We are informed by the Union Market National Bank of Watertown that Mr. John Christoforo, division chief deputy from your office, has this day made demand upon and received from said bank the sum of $39,043.99, alleging that the same was due as an additional income tax imposed on the Hood Rubber Company for the year 1918, together with interest thereon.

Please be advised that the Hood Rubber Company protests against this action and states that the alleged sum was not due from it to the United States of America, and has therefore been illegally seized and taken by Mr. Christoforo.

Demand is hereby made for the return of said sum, to wit, $39,043.99, forthwith.

Very truly yours,

HOOD RUBBER COMPANY.
HAROLD C. HASKELL.

HCH:GEG.

13 *Exhibit D to Declaration*

CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

Treasury Department.
Internal Revenue Service.
Form 843—Jan., 1922.
Comptroller General U. S.
January 18, 1922.

Important

File with the collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Collector's notation

District:

Account number:

Date received
(stamp here):

Collector of Internal Revenue.

STATE OF MASSACHUSETTS,
County of Middlesex, ss:

Hood Rubber Company (name of taxpayer).

98 Nichols Avenue, Watertown, Massachusetts (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

14 1. Business in which engaged: Manufacture of rubber goods. Period from Jan. 1, 1918, to Dec. 31, 1918.

2. Character of assessment or tax: Income and profits. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: $39,043.99.

4. Reduction of tax liability requested (income and profits tax): ———.

5. Amount to be abated: ———.

6. Amount to be refunded (or such greater amount as is legally refundable): $39,043.99.

7. Dates of payment (see collector's receipts or indorsements of canceled checks): December 15, 1926. (If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed: Massachusetts.

9. District in which unpaid assessment appears: ———.

10. Amount of overpayment claimed as credit: ———.

11. Unpaid assessment against which credit is asked: Period from ——— to ———.

Deponent verily believes that this application should be allowed for the following reasons:

See statement hereto annexed and marked "A."

(Signed) HOOD RUBBER COMPANY,
By (Sgd.) DONALD T. HOOD,
Treasurer.

Sworn to and subscribed before me this tenth day of January, 1927.

——— ———, *Notary Public.*

(Filed January 18, 1928.)

15 *Exhibit D*—Continued

A

The Hood Rubber Company filed its income and consolidated excess-profits tax return for the calendar year 1918 on the 14th day of March, 1919.

This return is on a printed form furnished by the Treasury Department and is headed as follows: "Form 1031–T—Tentative return and estimate of corporation income and profits taxes and request for extension of time for filing return."

The blank contains a request for an extension of time for forty-five (45) days and gives the following reason for asking this extension: "No forms or regulations as yet received, so unable to complete figures."

The return contained an estimated tax due of $300,000, and with it a check for $75,000 was enclosed. Later a further extension of time was granted and the company was permitted to file a completed return on or before July 14, 1919.

In the meantime a bill was received from the collector for the payment of the second installment, based on the tentative return and estimate filed, and a second check for $75,000 was sent to the collector on June 16, 1919.

A completed return was filed on July 14, 1919, showing a total tax due of $169,772.65 on the basis of this return, and final payment was made December 12, 1919, of $19,772.65.

On January 26, 1924, a waiver was signed and filed, which stipulated that the company consented "to a determination, assessment, and collection of the amount of income, etc., taxes due under any return made by or on behalf of said companies for the year 1918, under the revenue act of 1921 or under * * * prior act * * *."

On February 16, 1924, a letter was received showing an additional tax of $249,131.96, which amount was later reduced to $191,-
16 978.98, and this amount was assessed to the Hood Rubber Company on March 18, 1925, as an additional tax.

Later correspondence and conferences with the department resulted in credits being issued which finally reduced the amount assessed to $39,043.99. The Hood Rubber Company having refused to pay this tax, a warrant of distraint issued, and on December 15, 1926, a deputy marshal of the United States levied on and seized money of the Hood Rubber Company in the Union Market National Bank of Watertown, Massachusetts, said levy being for the amount of said tax and interest, a total of $39,043.99.

Immediately upon notice that this had been done the Hood Rubber Company filed a protest with the Commissioner of Internal Revenue at Boston, Massachusetts, and demanded the return of the money so seized.

Although the assessment was apparently made in March of 1925, according to the terms of the waiver filed on January 26, 1924, any "determination, assessment, and collection" would have to be made under the provisions of the revenue act of 1921. The return having been filed in 1919, the assessment would have to be made in 1924, except for the waiver, and the taxpayer in filing a waiver only consented to be assessed under the provisions of the revenue act of 1921.

From the foregoing facts it seems clear that the alleged additional tax taken on distraint by the Government was:

(1) Illegally collected.
(2) Illegally assessed.

1. Section 250 (d) of the revenue act of 1921 provides: "No suit or proceeding for the collection of any such taxes, due under this act or any prior income, etc., acts, shall be begun after the expiration of five (5) years from the date when such return was filed."

The time for collection as well as for assessment would have expired on March 15, 1924, had it not been for the waiver, which extended the time for collection by its terms to March
17 15, 1925. The waiver, by its very language, consents to a "determination, assessment, and collection" of the tax within a period of one year after the statute of limitations would otherwise expire.

A number of court decisions seem to have definitely settled the point that both the assessment and collection must be made within the period fixed by the statute, and that any collection after the expiration of the limitation period is illegal. The case of Bashara vs. Hopkins (290 Fed. 592) is typical and the language of the court at page 595 states the matter very clearly.

"* * * A collection of a tax made beyond the period allowed by law would be illegal and such a collection would stand exactly upon the same basis as a collection made under an unconstitutional statute."

Another similar case is that of Seaman vs. Bowers (297 Fed. 371), in which the court at page 374 uses the following language:

"It was clearly the legislative intent to set up the statutory limitation against the collection of the tax, whether by administrative action or by suit at law."

To the same effect is the case of New York and Albany Lighterage Company vs. Bowers (10 Fed. (2d) 1017) decided by the Circuit Court of Appeals of the Second Circuit. This case was taken to the United States Supreme Court on a writ of certiorari and argued on January 5, 1927. At the conclusion of the argument presented by counsel for the Government (the petitioner) the court excused the taxpayer from the presentation of any argument, which would seem to indicate that it will sustain the finding of the lower court.

The taxpayer's position is stronger than that in any of the cited cases, because by the terms of the waiver itself it expressly
18 stipulated that the collection must be made within one year after the period of limitations expired. The very latest date on which the Government could proceed to collect the tax, either by court proceedings or by warrant of distraint, was March 15, 1925. The tax having been collected on December 15, 1926, said collection is wholly illegal and void.

2. Section 239 (a) of the revenue act of 1921 provides "that every corporation subject to taxation under this title * * * shall make a return showing specifically the items of gross income, etc."

By section 227 of the same act "if the return is made on the basis of the calendar year, then the return shall be made on or before the

15th day of March," and later in the same section, "The commissioner may grant a reasonable extension of time for filing returns, whenever in his judgment good cause exists, etc."

The regulations of the Treasury Department provide that "returns made under this act * * * must be made on the forms prescribed by this department for each particular year."

If it be contended that the return made by the Hood Rubber Company on March 14, 1919, is not "the return" contemplated by the statute, it is suggested that it conforms in all respects with the sections of the statute and the regulations above stipulated.

It was made on the basis of the calendar year and filed on or before the 15th day of March. It was made on a form prescribed by the Treasury Department and was accompanied by a check in payment for the first installment of the amount of tax which it showed was due. The Treasury Department recognized it as a return by sending a bill for the second installment on the basis of this very document.

Congress has given the Commissioner of Internal Revenue authority to do one of two things—either receive a return accompanied by a check for a proper amount of payment of tax which may be due, or to extend the time for filing a return. Of course if the commissioner extends the time for filing the return the corporation is excused from filing such return until the period granted has expired, and if such time is granted no payment of tax will be due until the return is filed.

19

More than this, the document itself is called "a tentative return" and distinguishes between a tentative return and a completed return; it is obvious that only what has been begun can be completed, all of which shows clearly that the document filed by the taxpayer in 1918 was "the return" contemplated by the revenue act.

This return having been filed as of March 15, 1919, an assessment should have been made before March 15, 1924, which period of time, however, was extended by the waiver to March 15, 1925. The tax was actually assessed by the Treasury Department on March 18, 1925, which was three (3) days after the statute of limitations had run against such assessment. No assessment could legally have been made subsequent to March 15, 1925, and the assessment as made is wholly illegal and void.

The sum of $39,043.99 having been both illegally assessed and illegally collected, it is respectfully requested that the said amount be refunded, together with interest thereon from December 15, 1926.

HOOD RUBBER COMPANY,
By (Signed) DONALD T. HOOD, *Treasurer*.

20 *Exhibit E to declaration*

Address reply to Commissioner of Internal Revenue and refer to IT:CR:D, CT.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, November 3, 1927.

HOOD RUBBER COMPANY,
98 Nichols Avenue, Watertown, Massachusetts.

SIRS: Your claim for the refund of $39,043.99, income and profits tax for the year 1918, has been examined.

The claim is based on the statements that the tax was illegally assessed and illegally collected.

In accordance with Solicitor's Memorandum 1404, published in Cumulative Bulletin 111–1, the bureau holds "the five-year period of limitation upon assessments of income and profits taxes, provided in section 250 (d) of the revenue act of 1921, begins to run from the date of the filing of the complete return, and not from the date the tentative return was filed." Your complete return was filed July 14, 1919, and the period within which tax could be assessed under the revenue acts of 1918 and 1921 would therefore extend to July 14, 1924, and the waiver extending the period for one year would expire July 14, 1925. The assessment made in March, 1925, was therefore made before the expiration of the waiver.

Section 278 (d) of the revenue acts of 1924 and 1926 provides that where assessment of the tax is made within the period prescribed in sections 277 or 278 of those acts such tax may be collected by distraint begun within six years after the assessment of the tax.

21 Since the tax was assessed within the statutory period applicable thereto, as extended by waiver, and the collection of such tax was made within the period of limitation provided in the revenue acts of 1924 and 1926, a refund of the tax based on the contention that such tax was assessed and collected after the expiration of the statutory period properly applicable thereto must be denied.

Your claim will therefore be rejected.

The notice of this rejection will officially appear on the next schedule to be approved by the commissioner.

Copy of this letter has been mailed to Mr. F. S. Bright in accordance with your authorization contained in your power of attorney running to him, which is on file in this office.

Respectfully,

C. B. ALLEN,
Deputy Commissioner.
By (Sgd.) H. B. ROBINSON,
Head of Division.

Upon the filing of the writ and declaration herein, an order to plead was entered.

In United States District Court

Answer

Filed February 17, 1928

Now comes the defendant in the above-entitled action and for his answer denies each and every material allegation, item, count, and particular in the declaration contained.

By his attorneys:

FREDERICK H. TARR,
United States Attorney,
By J. M. LEINENKUGEL,
Special Assistant to the U. S. Attorney.

22 In United States District Court

Waiver of jury trial

Filed June 21, 1928

It is hereby agreed by and between the parties to the above-entitled action that a trial by jury therein be waived.

HAROLD C. HASKELL,
Attorney for Plaintiff.
FREDERICK H. TARR,
United States Attorney, Attorney for Defendant,
By J. M. LEINENKUGEL,
Special Asst. to the U. S. Atty.

In United States District Court

Agreed statement of facts

Filed July 26, 1928

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. That the plaintiff is a Massachusetts corporation with its usual place of business in Watertown, Massachusetts; that the defendant was on December 15, 1926, and still is collector of internal revenue for the district of Massachusetts.

2. That on March 14, 1919, the plaintiff filed with the then collector of internal revenue, for the calendar year 1918, Form 1031–T,
23 entitled "Tentative return and estimate of corporation income and profits taxes and request for extension of time for filing

return"; that a copy of said Form 1031–T, annexed to plaintiff's declaration and marked "A," is a true and correct copy of said Form 1031–T and is hereby referred to and made a part of this agreement; that said Form 1031–T was furnished by the Treasury Department; that the estimated amount of tax for the calendar year 1918 shown on said Form 1031–T was three hundred thousand dollars ($300,000.00); that the plaintiff paid at the time said Form 1031–T was filed the sum of seventy-five thousand dollars ($75,000).

3. That the time for filing a completed return was first extended to April 29, 1919, and again to July 14, 1919; that at sometime between March 14, 1919, and June 16, 1919, the plaintiff received from the then collector of internal revenue a demand for payment of seventy-five thousand dollars ($75,000), the same being the second instalment of taxes shown to be due by the return made March 14, 1919, and herein referred to as Exhibit A, and on June 16, 1919, the plaintiff paid said sum of seventy-five thousand dollars ($75,000) in consequence of said demand. A copy of said demand is hereto annexed and made a part of this agreement.

4. That on July 14, 1919, the plaintiff filed for the calendar year 1918 Form 1120, entitled "Corporation income and profits tax return," disclosing a total tax due from the plaintiff for the calendar year 1918 in the amount of one hundred sixty-nine thousand seven hundred seventy-two dollars and sixty-five cents ($169,772.65), of which amount one hundred fifty thousand dollars ($150,000) having been paid, the balance, amounting to nineteen thousand seven hundred seventy-two dollars and sixty-five cents ($19,772.65), was duly paid on December 15, 1919. A copy of the same is hereto attached.

5. That on January 26, 1924, the plaintiff and the Com-
24 missioner of Internal Revenue entered into an agreement entitled "Income and profits tax waiver"; that the copy of said waiver annexed to plaintiff's declaration and marked "B" is a true and correct copy of the same and is hereby referred to and made a part of this agreement.

6. That thereafter the Commissioner of Internal Revenue determined that additional taxes were due from the plaintiff for the calendar year 1918, amounting to two hundred forty-nine thousand one hundred thirty-one dollars and ninety-six cents ($249,131.96), and that the plaintiff was duly notified of said determination on February 16, 1924; that this amount was afterward reduced to one hundred ninety-one thousand nine hundred seventy-eight dollars and ninety-eight cents ($191,978.98), which amount was on March 18, 1925, assessed to the plaintiff as an additional income and excess-profits tax for the calendar year 1918.

7. That thereafter and on July 6, 1926, the Commissioner of Internal Revenue notified the plaintiff that it had been overassessed for the calendar year 1918 the amount of one hundred forty-nine thousand twenty-six dollars and sixty-five cents ($149,026.65), which, deducted from the one hundred ninety-one thousand nine hundred

seventy-eight dollars and ninety-eight cents ($191,978.98), left a net assessment of forty-two thousand, nine hundred fifty-two dollars and thirty-three cents ($42,952.33); that a credit of ten thousand three hundred sixty-one dollars and thirty-five cents ($10,361.35) having previously been allowed to the plaintiff as an over-assessment for the year 1919, said amount was deducted from said forty-two thousand nine hundred fifty-two dollars and thirty-three cents ($42,952.33), leaving a balance alleged to be due of thirty-two thousand five hundred ninety dollars and ninety-eight cents ($32,590.98), which amount plus six thousand four hundred fifty-three dollars and one cent ($6,453.01) interest made a total amount alleged to be due from the plaintiff of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99).

8. That thereafter a warrant for distraint issued for the collection of said amount and that acting under said warrant, on December 15, 1926, a deputy marshal of the United States levied upon and seized money of the plaintiff to the amount of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), then being in the Union Market National Bank of Watertown, Massachusetts, and paid said sum to the defendant herein, returning the warrant of distraint as satisfied in full.

9. That on December 15, 1926, the plaintiff forwarded to the defendant a formal protest and demand for return of the money so seized; that the copy of said letter of protest annexed to plaintiff's declaration and marked "C" is a true and correct copy thereof and is hereby referred to and made a part of this agreement.

10. That on January 10, 1927, the plaintiff filed with the defendant a claim for refund of said amount to thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99); that the copy of said claim for refund annexed to plaintiff's declaration and marked "D" is a true and correct copy thereof, and is hereby referred to and made a part of this agreement.

11. That on November 3, 1927, the Commissioner of Internal Revenue rejected said claim for refund, as appears in a letter from the commissioner, a copy of which is annexed to plaintiff's declaration and marked "E"; that said copy is a true and correct copy thereof and is hereby referred to and made a part of this agreement.

12. That if the plaintiff is entitled to recover in this action the amount for which judgment should be rendered is the said sum of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99), together with interest thereon from December 15, 1926.

HAROLD C. HASKELL,
Attorney for Plaintiff.
FREDERICK H. TARR,
United States Attorney.
J. DUKE SMITH,
Special Assistant to United States Attorney,
Attorney for Defendant.

Form 1108. United States Internal Revenue.

OR MEMORANDUM FOR TAXPAYER—INCOME AND EXCESS PROFITS TAX FOR 1918

275

3RD DISTRICT, BOSTON, MASS., *June 16, 1918.*

Instructions to taxpayers

Detach this part of the form and retain it as a record of the payment of your tax unless you want a receipt other than the endorsement on your check. If a receipt is desired, forward this part of the form and the notice with your remittance. Otherwise no receipt will be assured.

Second installment, 1918, income tax.

#404831. H.

Hood Rubber Co., Watertown, Mass., $75,000.00.

Taxpayer's record

Check. No ----------	Money order. No----------
Bank----------	Office of issue----------
Date ----------	Date ----------

JOHN F. MALLEY,
Collector of Internal Revenue.

Income tax.	Paid June 17, 1919.
Excess-profits tax.	Cashier, F.
Total.	Boston, Mass.

27 [MEMORANDUM.—By agreement of counsel, copy of corporation income and profits tax return for the calendar year 1918, referred to in the foregoing agreed statement of facts as annexed, is here omitted, the original being detached and transmitted to the U. S. Circuit Court of Appeals with this transcript of record. James S. Allen, clerk.]

In United States District Court

Minute entry of hearing

On the said 26th day of July said cause was set down for hearing and fully heard by the court on the above-mentioned agreed statement of facts, the honorable James A. Lowell, District Judge, sitting.

Said cause was thence taken under advisement and on the 29th day of August, A. D. 1928, an opinion of the court was announced, ordering judgment to be entered for the plaintiff.

This cause was thence continued to the present September term, A. D. 1928, when, to wit, October 8, 1928, a draft bill of exceptions is filed by the defendant.

On the 14th day of November, A. D. 1928, the aforementioned bill of exceptions is allowed by the court.

On the 21st day of November, A. D. 1928, the following motion for entry of judgment forthwith is filed and assented to:

In United States District Court

Motion for entry of judgment forthwith

Filed November 21, 1928

Now comes the plaintiff in the above-entitled cause and moves that judgment for the plaintiff, with costs, be entered forthwith.

By its attorney:

HAROLD C. HASKELL.

Assented to:

FREDERICK H. TARR,
United States Attorney,
By J. DUKE SMITH,
Special Assistant to United States Attorney.

28 In United States District Court

Judgment

On the 27th day of said November the motion for entry of judgment is allowed by the court.

Thereupon, to wit, November 27, 1928, it is considered by the court, the honorable James A. Lowell, District Judge, sitting, on the finding of the court, that the said Hood Rubber Company, plaintiff, recover of the said Thomas W. White, collector of internal revenue for the district of Massachusetts, defendant, the sum of thirty-nine thousand forty-three dollars and ninety-nine cents ($39,043.99) damages, together with interest amounting to four thousand five hundred and sixty-eight dollars and fifteen cents ($4,568.15), and its costs of suit taxed at $———.

In United States District Court

3228. Law. 3229. Law

HOOD RUBBER CO. v. THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE

Opinion

August 29, 1928

LOWELL, J.: These were two actions to recover income and excess-profits taxes for the year 1918 and 1919, paid under protest. The facts are similar, and it was agreed at the hearing that the determination of one of them would carry with it the decision of the other.

On March 14, 1919, the plaintiff filed an estimated return of profits for the year 1918 in the sum of $300,000, and paid at the same time the first quarterly installment of $75,000. The return was made out on a paper called a "Tentative return and request for extension of time." The time for filing a completed return was twice extended, the last date being July 14, 1919. In the meantime the commissioner had demanded, and the plaintiff had paid, a second quarterly installment of $75,000. The completed return was filed on July 14,
29 1919. On January 26, 1924, the plaintiff and the commissioner came to an agreement, extending the time of assessment and collection of the taxes for one year beyond the statutory period of limitation (five years in all). This instrument was as follows:

"JANUARY 26, 1924.

"Income and profits tax waiver:

"In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921, Hood Rubber Company and affiliated companies, of Watertown, Mass., and the Commissioner of Internal Revenue hereby consent to the determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said companies for the year nineteen hundred and eighteen under the revenue act of 1921, or under prior income, excess-profits, or war-profits tax acts. * * * This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the bureau, within which assessments of taxes may be made for the year or years mentioned."

The commissioner assessed the taxes on March 18, 1925, and collected them by restraint on December 15, 1926.

The plaintiff contends that the taxes were illegally assessed and collected, as both the assessment and collection were made after the expiration of the time allowed by the waiver.

Two questions arise:

First—Was the assessment made in time? and

Second—Was the tax collected in time?

The first question depends upon the meaning of the word
30 "return" as used in the statute. The waiver, construed in connection with the statute, allowed five years from the return in which to make the assessment. If the word "return" refers to the tentative return, the Government did not assess the tax in time. If, however, it refers to the completed return, the assessment was made within the required five years. This question, which is not free from doubt, need not be decided, as even if it be granted that the assessment was made in time the tax was not collected within five years from the date of the completed return.

The Government's contention that the waiver did not limit the time of collection of the tax to six years is unsound. The Govern-

ment takes advantage of the six-year period for assessment, and then says that the six-year period for collection was changed by the later statute of 1924, which allowed six years after a valid assessment for collection. The Government can not have its cake and eat it too. Either the waiver conferred no power on the Government to make the assessment later than the statutory period allowed, or it set up a six-year restriction on collection as well as assessment. It is distinctly unfair for the Government to take advantage of one part of the waiver and refuse to be bound by the other part of it. The statement made in the Government's brief and in some of the cases—that the waiver was made by the taxpayer and the commissioner with future statutes in view—seems far-fetched. A distinct limitation of six years (one year more than the period then prescribed by statute) was expressly put in the waiver, showing that the six-year period was a matter of importance to both sides. As the taxing statutes were being changed at nearly every session of Congress, the parties would undoubtedly have referred to future taxing acts had they had them in mind.

The Government cites cases to the effect that "no officer of the Government has the right to waive the statute of limitations in favor of the United States." See, for instance, DeArnaud v.
31 United States (151 U. S. 483). These cases are sound law, but they apply only to statutes of limitation then in force, and not to ones which are prescribed by Congress in later acts. In this case the commissioner did not waive a statute of limitation; it was the taxpayer who waived it and gave more time to the commissioner to assess and collect the taxes.

The Government also contends that Congress had the power to change the time for collection set up by the waiver without thereby infringing any of the plaintiff's constitutional rights. This argument is unsound. It was to the advantage of both parties that the period of limitation should be extended, and it was of special advantage to the plaintiff that it should know when the taxes might be considered as unenforceable so that it might properly arrange its financial affairs. This seems to be clearly a case of a binding contract which can not be varied by subsequent legislation. (C. & N. W. Ry. Co. v. United States, 104 U. S. 680.)

The Government cites certain paragraphs from the opinion of the Board of Tax Appeals in Sunshine Coat and Suit Co., Petitioner, v. Commissioner (10 B. T. A. 971) in support of its contention in the present case. That case was rightly decided, as the collection of the tax was not mentioned in the last two of the three waivers which were there in suit, so that the assessment having been made in time the provisions of the act of 1924, allowing collection to be made within six years of a valid assessment, came into force. The passages in the opinion cited by the Government were not necessary to the decision in the case, and therefore do not carry with them as much weight as if they were not obiter dicta.

Judgment for plaintiff.

In United States District Court

Defendant's bill of exceptions and order settling same

Filed October 8, 1928; allowed November 14, 1928

This is an action at law against Thomas W. White, collector of internal revenue for the district of Massachusetts,
32 to recover income and excess profits taxes for the calendar year 1918 in the amount of $39,043.99 and interest from December 15, 1926. The pleadings are part of this record and may be referred to as part of this bill of exceptions. The case was tried before Lowell, J., without a jury upon an agreed statement of facts. The following are all the material facts in the case.

The plaintiff, a Massachusetts corporation, on March 14, 1919, filed with the then collector of internal revenue for the district of Massachusetts an income and excess profits tax return for the calendar year 1918, designated "Tentative return," on a form prescribed and furnished by the Treasury Department, there being then no other form for making such a return. The plaintiff at the time of filing said return paid the sum of $75,000 on account of taxes due for the calendar year 1918.

The time for filing plaintiff's completed return was extended to April 29, 1919, and again until July 14, 1919. Between April 29, 1919, and June 16, 1919, the plaintiff received from the then collector of internal revenue a demand for payment of $75,000, being the second installment shown to be due by the return made on March 14, 1919, and on June 16, 1919, the plaintiff paid said sum of $75,000 to the then collector of internal revenue.

On July 14, 1919, the plaintiff filed a completed return, disclosing a total tax due from the plaintiff for the calendar year 1918 in the amount of $169,772.65, of which amount $150,000 having been paid the balance of $19,772.65 was paid on December 15, 1919.

On January 26, 1924, the plaintiff and the Commissioner of Internal Revenue entered into an agreement in writing entitled "Income and profits tax waiver," the body of which was in words and figures as follows:

33 "In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921, Hood Rubber Company and affiliated companies, of Watertown, Mass., and the Commissioner of Internal Revenue hereby consent to the determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said companies for the year nineteen hundred and eighteen under the revenue act of 1921, or under prior income, excess-profits, or war-profits tax acts. * * * This waiver is in effect from the date it is assigned by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limita-

tion, or the statutory period of limitation as extended by any waivers already on file with the bureau, within which assessments of taxes may be made for the year or years mentioned."

Thereafter, on March 18, 1925, the Commissioner of Internal Revenue assessed an additional income and excess-profits tax against the plaintiff in the amount of $191,978.98. Said amount was subsequently reduced by the commissioner to $49,405.34, and a credit of $10,361.35 having previously been allowed as an overassessment for the year 1919 said amount was deducted from the amount of $49,405.34, leaving a balance of $39,043.99, which was collected by distraint on December 15, 1926.

On January 10, 1927, the plaintiff duly filed with the defendant a claim for refund in the amount of $39,043.99, and on November 3, 1927, said claim was rejected in its entirely by the Commissioner of Internal Revenue.

At the conclusion of the argument the defendant filed a motion for judgment and a request that the court find as matters of law the following:

34 1. That the tentative return and estimate of corporation income and profits taxes and request for extension of time for filing return was not the return of the taxpayer for the calendar year 1918 required by the provisions of section 239 of the revenue act of 1918, and that the statute of limitations as to assessment and collection did not start running from the date said tentative return was filed.

2. That the return required by the provisions of section 239 of the revenue act of 1918 for the calendar year 1918 having been filed by the plaintiff on July 14, 1919, under section 250 (d) of the revenue act of 1921, the commissioner had five years from July 14, 1919, to make an assessment and collection of plaintiff's 1918 tax; that the waiver executed January 26, 1924, gave the commissioner until July 14, 1925, to make such assessment and collection of plaintiff's 1918 tax; that the additional assessment of plaintiff's 1918 tax was made on March 18, 1925, well within the period as extended by the waiver.

3. That in a case where the assessment of a tax is properly made within the period of limitation properly applicable thereto, subsequent to the enactment of the revenue act of 1924, said section 278 (d) of the revenue act of 1924 allows the commissioner six years from the date of said assessment within which to make collection.

The court in an opinion handed down on August 29, 1928, held that even if it be granted that the assessment was made in time the tax was not collected within six years from the date of the completed return, and that the waiver filed by the taxpayer did not extend the period of collection for more than a year after the period for assessment and collection as fixed by the statute; that there was binding contract between the taxpayer and the Government which could not

be varied by subsequent legislation; that judgment should be entered for the plaintiff.

The defendant being aggrieved by the ruling of the court, as hereinbefore set forth, and its refusal to grant defendant's motion for judgment and his request for findings of law, now excepts to said rulings and brings this bill of exceptions and prays that it may be allowed.

By his attorneys:

FREDERICK H. TARR,
United States Attorney.
By J. DUKE SMITH,
Special Asst. to the U. S. Atty.

The foregoing bill of exceptions may be allowed.

HAROLD C. HASKELL,
Attorney for petitioner.

The foregoing bill of exceptions is allowed this 14 day of November, 1928.

JAMES A. LOWELL, *D. J.*

In United States District Court

Defendant's petition for appeal

Filed January 24, 1929

Now comes the defendant, Thomas W. White, collector of internal revenue for the first district of Massachusetts; conceiving himself aggrieved by the finding and ruling of the court, and the judgment entered in pursuance thereof on the twenty-seventh day of November, 1928, in the above-entitled cause, does hereby appeal from the said finding, ruling, and judgment to the United States Circuit Court of Appeals for the First Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers, upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit.

By his attorneys:

FREDERICK H. TARR,
United States Attorney.
By J. DUKE SMITH,
Special Asst. to the U. S. Atty.

Petition for appeal allowed.

JAMES A. LOWELL,
United States District Judge.

36 In United States District Court

Defendant's assignment of errors

Filed January 24, 1929

The defendant in this action, in connection with his petition for appeal, makes the following assignment of errors, which he avers occurred upon trial of the case, to wit:

I. The court erred in refusing to grant the request of the defendant for rulings of law as follows:

"1. That the tentative return and estimate of corporation income and profits taxes and request for extension of time for filing return was not the return of the taxpayer for the calendar year 1918 required by the provisions of section 239 of the revenue act of 1918, and that the statute of limitations as to assessment and collection did not start running from the date said tentative return was filed.

"2. That the return required by the provisions of section 239 of the revenue act of 1918 for the calendar year 1918 having been filed by the plaintiff on July 14, 1919, under section 250 (d) of the revenue act of 1921, the commissioner had five years from July 14, 1919, to make an assessment and collection of plaintiff's 1918 tax; that the waiver executed January 26, 1924, gave the commissioner until July 14, 1925, to make such assessment and collection of plaintiff's 1918 tax; that the additional assessment of plaintiff's 1918 tax was made on March 18, 1925, well within the period as extended by the waiver.

"3. That in a case where the assessment of a tax is properly made within the period of limitation properly applicable thereto, subsequent to the enactment of the revenue act of 1924, said section 278 (d) of the revenue act of 1924 allows the commissioner six years from the date of said assessment within which to make collection."

37 II. The court erred in ruling that the plaintiff was entitled to recover.

Wherefore the petitioner prays that the judgment of the District Court may be reversed.

By his attorneys:

FREDERICK H. TARR,
United States Attorney,
By J. DUKE SMITH,
Special Asst. to the U. S. Atty.

[Citation in usual form, showing service on Charles C. Gammons, omitted in printing.]

38 [Clerk's certificate to foregoing transcript omitted in printing.]

[MEMORANDUM.—An order of enlargement of time for docketing case to and including March 25, 1929, is here omitted. A. I. Charron, clerk.]

39 In United States Circuit Court of Appeals for the First Circuit

No. 2338. October term, 1928

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, DEFENDANT, appellant

v.

HOOD RUBBER COMPANY, PLAINTIFF, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, MORRIS, and BREWSTER, JJ.

Opinion

Filed June 25, 1929

BINGHAM, J.: This is a suit brought by the Hood Rubber Company, appellee, in the Federal District Court for Massachusetts, to recover $39,043.99, the amount of an additional income and excess-profits tax for the year 1918, which was collected by distraint on December 15, 1926. By stipulation in writing the case was tried before the court without a jury.

The plaintiff, appellee, on March 14, 1919, filed its income and excess-profits tax return for the calendar year 1918, in which it estimated its tax at $300,000. This return was made on a form prescribed and furnished by the Treasury Department, known as "Form 1031–T" and designated as a "tentative return." At the time of filing this return the plaintiff paid one quarter ($75,000) of the
40 tax as shown by its return. And June 16, 1919, upon the demand of the collector, it paid as a second installment of the tax the further sum of $75,000. July 14, 1919, the plaintiff filed a completed, revised, or amended return showing its total tax for the calendar year 1918 to be $169,772.65, and on December 12, 1919, paid the balance of the tax, $19,772.65, as shown by this completed or amended return. January 26, 1924, while the revenue act of 1921 was in force, the plaintiff and the Commissioner of Internal Revenue entered into a written agreement, authorized by section 250 (d) of the revenue act of 1921, extending the statutory period of limitation (five years) an additional period of one year in which to determine, assess, and collect the amount of income and excess-profits taxes due under any return made by the plaintiff for the year 1918 under the revenue act of 1921, or under prior income and excess-profits acts.

Thereafter the commissioner determined that an additional tax for the year 1918 was due, and on March 18, 1925, after the revenue

act of 1924 was enacted, assessed an additional tax against the plaintiff, which amounted to $39,043.99, after making certain deductions and allowance of credits. On December 15, 1926, a collection of this tax was had by distraint. A claim for refund was duly filed and rejected, and on January 12, 1928, this suit was brought.

In the District Court it was held that if the word "return" (as used in section 250 (d) of the act of 1921) meant the tentative return the Government did not assess the tax in time. But if it meant the return of July 14, 1919, the assessment was made within the required five years plus the additional year provided for in the waiver agreement. It said, however, that the question need not be decided, for if it be granted that the completed or amended return fixed the time from which to reckon, and the assessment was seasonably made, the tax was not collected either within five or within six years from the filing of the completed return; that the Government, having taken advantage of the six-year period for assessment, could not say that the six-year period for collection was changed by the subsequent act of 1924, which allowed six years after the
41 assessment for collection; that either the agreement of waiver conferred no power on the Government to make the assessment later than the statutory period allowed (five years), or the agreement applied to the time fixed for the collection as well the assessment; that it was to the advantage of both parties that the period of limitation should be extended—of advantage to the Government for the reason that, at the time the agreement of waiver was made, the statutory limitation of five years had nearly expired, and of advantage to the plaintiff to know when the tax would become unenforcible, so that it might properly arrange its financial affairs. And such being the case the agreement of waiver constituted a binding contract, which Congress did not intend to have affected by the provisions of the act of 1924. (C. & Nw. Ry. Co. v. United States, 104 U. S. 680.) Having reached this conclusion, the court entered judgment for the plaintiff in the sum of $39,043.99, with interest amounting to $4,568.15, and cost of suit. It is from this judgment that this appeal is taken.

For reasons that will later appear we do not find it necessary to consider whether the ground upon which the court below reached its conclusion was right or not.

The first question presented is whether the return filed March 14, 1919, is the one from which the five-year period of limitation (fixed by the revenue acts of 1918 and 1921), as extended by the waiver agreement of January 26, 1924, for one year, under the authority of the act of 1921, or whether the revised or amended return is the one from which the period of limitation is to be reckoned, for if the former is the one the additional tax of March 18, 1925, was not seasonably assessed.

There are apparently three cases in which this question has been under consideration in the Federal Courts: Florsheim Bros. Dry

Goods Co., Limited, v. United States (29 Fed. (2d) 895, 896 (5th Cir. Ct. of App.)), decided December 19, 1928; Rasmussen v. Brownfield-Canty Carpet Co. (31 Fed. (2d) 89, 91 (9th Cir. Ct. of App.)), decided February 11, 1929; and Brandon Corp. v. Jones, Collector, decided March 30, 1929 (Eastern Dist. of So. Car.).

In the first case no discussion of the question was had. All
42 that was said concerning the matter was: "It is suggested in argument that the statutory period of limitations began to run from the date of the tentative return in March of 1919; but we are of opinion that the return meant by the statute was the final or completed return."

In the second case Judge Gilbert pointed out that the Board of Tax Appeals had entertained contrary views, and he took the position that the original or tentative return and not the completed or amended one fixed the date for the beginning of the running of the statutes of limitation as outlined in section 250 (d) of the act of 1921, but his associates refrained from expressing an opinion upon the question, as the distraint proceedings there in question were barred whether the period of limitation began to run from the filing of the tentative return or of the completed or amended one.

In the third case the facts and circumstances attending the filing of the so-called tentative return (Form 1031–T, prescribed by the Commissioner of Internal Revenue), were presented and considered, and it was held that the period of limitation began to run from the filing of the original or tentative return and not from the filing of the completed or amended return. It was there said:

"The revenue act for 1918, was enacted on Feb. 24, 1919. Under the act, returns were to be filed by March 15, 1919, and the tax paid in quarterly installments on March 15, June 15, Sept. 15, and Dec. 15, 1919. The law also provided that in case an extension of time for filing the return was granted the date for payment of the first installment should be correspondingly extended. [Section 250 (a).] It was evident that many taxpayers would be unable to prepare their returns by March 15. The requirements of the Government, however, were such that it was advisable that the first installment should be paid by that time. In order to meet this situation, the Commissioner of Internal Revenue issued two rulings, one on Feb. 13, 1919, and the other on Feb. 27, 1919. In the first ruling it was stated that no general extension of time would be authorized, but that the commissioner had approved a novel feature of tax collection which would serve for all practical purposes as a possible extension of forty-
43 five days for the filing of the return, where the parties were unable to complete and file their returns by March 15. He also announced in that ruling that if a corporation finds it impossible to complete its return in time, it might make a return of the estimated tax due and make payment thereof not later than March 15; and if a meritorious reason was shown why the corporation was unable to complete its return the collector would accept the payment of the

estimated tax and agree to accept a revised and completed tax return within a period of not more than forty-five days. The ruling of Feb. 27, 1919, contains the following pertinent clauses:

"'Income-tax payers, both corporation and individual, were to-day granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15 to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess-profits returns, provided in every case the taxpayer pays on or before March 15 at least 25% of the estimated amount of the tax due.

"'A supply of blanks of Form 1040–T, for the use of individuals as tentative return on the estimated tax basis, were shipped to each collector of internal revenue to-day. Collectors will furnish this form to any individual requesting an extension of time for the filing of this complete return for 1918.

"'The tentative return to be used by corporations who make payment of the estimated tax due on or before March 15 is being printed, and a supply will be forwarded to-morrow to each collector, who will mail these forms to every corporation on his list. (To be known as Form 1031–T.)

"'Under the estimated tax procedure, which is now available to every taxpayer under the income and excess-profits section of the new revenue law, there is no extension beyond the legal due date, March 15, for the payment of the taxes then falling due.

"'It is urged by the bureau that the estimates be computed on the most exact basis available. Should the first payment to be made on or before March 15, under this plan, be greater than the amount eventually found to have been due upon examination of the completed return, the excess payment will be automatically credited against the next installment, which will be due June 15.

"'The taxpayer will not be relieved, however, under this
44 plan, of the interest due upon any amount by which his payment on March 15 may fall short of the amount found to have been due upon examination of the completed return.'

"Pursuant to these rulings the taxpayer on March 14, 1919, filed its tentative return on Form 1031–T, together with a statement of the estimated amount of the tax, accompanied by a remittance of one-fourth thereof. This form contains the statement that the form and remittance covering one-fourth of the estimated tax must reach the collector's office on or before March 15, 1919. On the duplicate under the head of 'Penalties' it is stated that there is a penalty of $1,000.00 for failure to make return on time. On June 16, 1919, the completed return was filed."

After stating the respective contentions of the parties—that of the Government that the tentative return did not contain the information which the law required and amounted to nothing more than

an agreement for an extension of time, and that of the taxpayer that conceding that the tentative return did not contain all the information required by law, nevertheless it was a return for several purposes and must therefore be deemed a return from the filing of which the statute starts to run—the opinion continues:

"The tentative return certainly can not be construed to be merely an agreement for extension of time and to constitute no return in any aspect. The commissioner in his ruling of Feb. 13, 1919, called it a 'return' and in the ruling of Feb. 27, 1919, a 'tentative return.' In Form 1031–T itself it is called a tentative return. There was certainly some reason for insisting that the paper be styled a tentative return. If it was not a return at all, but merely an agreement for an extension of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. It is clear therefore that the filing of Form 1031–T constituted such a return as to prevent the extension of time for payment of the first installment which the statute provided in all cases of an extension of time for the filing of a return. (See sections 227 (a) and 241 (a) of the revenue act of 1918 (40 Stats. 1075–1082 and section 250 (a) of the same act (40 Stats. 1082).)

"It is common knowledge that the revenue act of 1918
45 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the Government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the Government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of Feb. 13, 1919, and Feb. 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the return which he then required must be deemed the return contemplated by the statute whether termed merely a tentative return or not.

"But the tentative return was sufficient to constitute a return in another aspect. Sec. 250 (e) of the same act (40 Stats. 1083) provides that if any tax remains unpaid after it is due and for ten days after notice and demand there should be added a penalty. Notice and demand were a condition prerequisite to the collection of the tax, but the same section provided that in the case of the first installment the instructions printed on the return should be deemed sufficient notice of the date when the tax is due and sufficient demand. Form 1031–T contained instructions complying therewith and was a sufficient notice and demand to make the first installment payable on March 15, 1919.

* * * * * * *

"Again Form 1031–T contained an explicit statement of the penalty that would attach in case of failure to make return. The filing of this form prevented the attaching of the penalty. It must therefore be deemed a sufficient return so far as the imposition of this penalty is concerned. It is clearly therefore a return for that purpose.

* * * * * * *

"The law clearly contemplates so far as the starting of the statute of limitation is concerned but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The Government can not blow hot and cold. It can not say to the taxpayer 'File a paper which we
46 know to be incomplete and does not give all the information required by law and pay us the first installment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed return,' and then say later that 'the first paper which you filed was no return and the statute must start from the date of the final completed return.' It can not say, when its interests require it to do so, that the tentative return is a return and then when its interests require the contrary say that it is no return."

There are also decisions involving questions of like import where the original return was incomplete in certain respects, and it was held that the supplemental return operated as an amendment of and related back to the original return, which fixed the time for reckoning the period of limitation. (Thomas v. United States, 22 Fed. (2d) 1000; United States v. Mabel Elevator Co., 17 Fed. (2d) 109.)

The original or tentative return filed in this case disclosed a tax of $300,000, based on the best information then available, a tax in fact much larger than was the tax actually due. It was made on the form and in the manner required by the commissioner and was the only return that could then have reasonably been made. It did not extend the time for payment of the tax disclosed, for the taxpayer was required to pay and did pay the first installment of $75,000 on the filing of the return, when under the law it was mandatory that payment of the first installment of the tax should be extended, if it was not the return required but the mere grant of an extension of time for filing a return. It was the return that put the tax statute into operation as respects the payment of the particular tax and caused the penalty feature of the law to become operative in case the taxpayer failed to pay at the appointed time. And the logical conclusion is that it was the return that also put the statutory period of limitation into operation, and we so hold.

The commissioner unquestionably had authority to inaugurate and require the tentative-return method of collecting the tax, and the presumption is that he did so in conformity with law. (Updike v.

United States, 8 Fed. (2d) 913; sections 1305 and 1309 of the
47 rev. act of 1918 (40 St. 1142–3); and sections 1300 and 1303 of the rev. act of 1921 (42 Sts. 308–9). As the time for assessing and collecting the additional tax expired March 14, 1925, before the tax was assessed or collected, the assessment and collection was unauthorized, and the judgment of the court below must be affirmed.

The judgment of the District Court is affirmed, with costs to appellee in this court.

[Certificate to foregoing paper omitted in printing.]

47A–48 [Minute entry of argument and submission, April 16, 1929, omitted in printing.]

In United States Circuit Court of Appeals

Judgment

June 25, 1929

This cause came on to be heard April 16, 1929, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof it is now, to wit, June 25, 1929, here ordered, adjudged, and decreed as follows: The judgment of the District Court is affirmed, with costs to the appellee in this court.

By the court:

ARTHUR I. CHARRON, *Clerk.*

[Clerk's certificate to foregoing transcript omitted in printing.]

49 Supreme Court of the United States

Order allowing certiorari

Filed October 28, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34545. U. S. Circuit Court of Appeals, First Circuit. Term No. 414. Thomas W. White, collector of internal revenue, petitioner, vs. Hood Rubber Company. Petition for writ of certiorari and exhibit thereto. Filed September 23, 1929. File No. 34545.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term 1929.

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

HOOD RUBBER COMPANY,

Respondent.

MOTION OF RESPONDENT TO ADVANCE

FRANK S. BRIGHT,
Attorney.

HAROLD C. HASKELL,
Of Counsel.

The Print Craft Shop, Washington, D. C.

IN THE

Supreme Court of the United States

October Term, 1929.

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

HOOD RUBBER COMPANY,

Respondent.

MOTION OF RESPONDENT TO ADVANCE

Now comes the respondent, by its counsel, and moves that this case be advanced for argument immediately following the conclusion of the argument in Florsheim Bros. Dry Goods Company, Ltd., v. United States (October Term, 1929, No. 118).

The reason for this motion is that the only two questions in the present case are of general importance and are identically the same as the two principal questions in the Florsheim case (and counsel in that case advise us that it is not their intention to press the other specifications of error in that case). We also believe that the facts are even more fully and completely set forth in the record in the present case.

Each case is a taxpayer's suit for the recovery of income and profits taxes for the same year 1918. In

both cases Forms 1031–T were filed during March of 1919, and "consents in writing" for an extension of the statutory period of limitation (which consents were identical in terms and on the same form prepared by the Government) were filed early in 1924 and within five years after the filing of Form 1031–T. In both cases the issues are whether either the assessment or the collection of the taxes was barred by the statute of limitations. In both cases the two questions to be decided are (1) whether Form 1031–T was "**the** return" within the meaning of the statute, and (2) the construction and effect of the consents in writing in connection with certain new provisions of the subsequently enacted Revenue Act of 1924.

In the Florsheim case this court has granted the taxpayer's petition for certiorari to review a decision of the Circuit Court of Appeals for the Fifth Circuit in favor of the Government, and in the present case this court has granted the Government's petition for certiorari to review a decision of the Circuit Court of Appeals for the First Circuit in favor of the taxpayer.

Respectfully submitted,

FRANK S. BRIGHT,
Counsel for Respondent.

HAROLD C. HASKELL,
Of Counsel.

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No. 414

In the Supreme Court of the United States

OCTOBER TERM, 1929

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

HOOD RUBBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

INDEX

	Page
Petition:	
Statement	1
Specification of errors to be urged	4
Reasons for granting the writ	5
Brief in support of the petition:	
Opinions below	6
Jurisdiction	6
Questions presented	6
Statutes involved	6
Statement	11
Argument	11
Conclusion	14

CITATIONS

Cases:	
Bank of Commerce v. *Rose*, 26 F. (2d) 365	13
Boston Hide & Leather Co., Appeal of, 5 B. T. A. 617	12
Brandon Corporation v. *Jones* (D. C. S. C.), decided March 30, 1929	13
Commissioner v. *The Pilliod Lumber Co.*, No. 356, October Term, 1929	5
Corona Coal & Coke Co. v. *Commissioner*, 11 B. T. A. 240	12
Dallas Brass & Copper Co., Appeal of, 3 B. T. A. 856	12
Florsheim Bros. Dry Goods Co. v. *United States*, 29 F. (2d) 895	5,12, 13
Greylock Mills v. *Commissioner*, 31 F. (2d) 655	13
Loewer Realty Co. v. *Anderson*, 31 F. (2d) 268	13
Matteawan Mfg. Co., Appeal of, 4 B. T. A. 953	12
Paso Robles Mercantile Co. v. *Commissioner* (C. C. A. 9th), decided July 1, 1929	11
Pilliod Lumber Co. v. *Commissioner*, 7 B. T. A. 591	12
Rasmussen v. *Brownville-Canty Carpet Co.*, 31 F. (2d) 89	13
Russell v. *United States*, 278 U. S. 181	13
Statutes:	
Revenue act of 1918, c. 18, 40 Stat. 1057, 1075, 1081–1083—	
Sec. 227 (a)	7
Sec. 239	7
Sec. 241 (a)	7
Sec. 250 (b) (d)	7–8
Revenue act of 1921, c. 136, sec. 250 (d), 42 Stat. 227, 265	8
Revenue act of 1924, c. 234, 43 Stat. 253, 299–301, 352—	
Sec. 277 (a) (2) (U. S. C. Title 26, Sec. 1057)	9
Sec. 278 (d) (e) (U. S. C. Title 26, Secs. 1061, 1062)	3, 4, 9
Sec. 280 (U. S. C. Title 26, Sec. 280)	9
Sec. 1100 (a) (b) (U. S. C. Title 26, Sec. 1260)	9

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. ———

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

HOOD RUBBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Thomas W. White, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above case on June 25, 1929, affirming the judgment of the District Court of the United States for the District of Massachusetts.

STATEMENT

The respondent, a Massachusetts corporation, filed a tentative return of its income and excess-profits tax for the year 1918 on March 14, 1919.

(R. 22, 23.) This return, Form 1031 T, entitled "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," showed an estimated tax of $300,000 and was accompanied by respondent's check for $75,000, one-fourth of that amount. (R. 8–10.) On July 14, 1919, within the extended period of time, the respondent filed its completed return. (R. 23.) Under date of January 26, 1924, the respondent and the Commissioner executed a waiver in the following form (R. 11–12):

January 26, 1924.
(Date)

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Hood Rubber Company and Affiliated Companies of Watertown, Mass., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Companies for the year nineteen hundred and eighteen under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the tax payer and will

remain in effect for a period of one year after the expiration of the statutory period or limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

HOOD RUBBER COMPANY,
Taxpayer.
By FREDERICK C. HOOD,
President.
D. H. BLAIR, *Commissioner.*

The Revenue Act of 1924 was approved and took effect on June 2, 1924. (43 Stat. 253, 353.)

An additional tax of $39,043.99 was assessed on March 18, 1925, and collected by distraint on December 15, 1926. (R. 24, 25.) Claim for refund was filed and rejected, and the respondent brought action in the District Court for the District of Massachusetts to recover the tax on the ground that both the assessment and the collection thereof were barred by the statute of limitations. A jury was waived by written stipulation, and the case was tried to the court on an agreed statement of facts. (R. 3, 22, 125.)

The Government contended (1) that the statute of limitations did not commence to run until the filing of the completed return on July 14, 1919, and (2) that since the assessment was made within the statutory period as extended by waiver and subsequent to the effective date of the Revenue Act of 1924, Section 278 (d) of that Act authorized col-

lection at any time within six years after the assessment. The District Court did not decide whether the statute began to run from the filing of the tentative return or from the filing of the completed return, but disposed of the case upon the second issue, holding that the waiver constituted a contract which required that the Government not only assess but also collect the additional tax within six years after the filing of the return, and that Section 278 (d) of the Revenue Act of 1924 did not enlarge the collection period specified in the waiver. It accordingly entered judgment for the respondent.

On appeal, the Circuit Court of Appeals did not consider the point upon which the District Court based its decision but affirmed its judgment, on the first issue, holding that the statute of limitations was set in motion by the filing of the tentative return and that both the assessment and collection of the tax were too late.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the statute of limitations for the assessment and collection of taxes was set in motion by the filing of the tentative return.

(2) In not holding that the tax, assessed within the statutory period, as extended by waiver, and after the enactment of the Revenue Act of 1924, could be collected, by virtue of Section 278 (d) of that Act, at any time within six years of the assessment.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals in the instant case is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Florsheim Bros. Dry Goods Co.* v. *United States,* 29 F. (2d) 895. The *Florsheim case,* No. 118, October Term, 1929, is now pending before this Court on the taxpayer's petition for a writ of certiorari and a memorandum filed by the Solicitor General calling the attention of the Court to the conflict of decisions resulting from the decision of the Circuit Court of Appeals in the instant case.

A similar, although not identical, question is raised in the pending petition for a writ of certiorari in *Commissioner* v. *The Pilliod Lumber Co.,* No. 356, October Term, 1929.

The instant case is of general importance. The questions presented are involved in a number of cases now pending before the courts, the Board of Tax Appeals, and the Treasury Department. For the information of taxpayers generally and for the guidance of the Treasury Department in its administration of the tax laws, we submit that the questions should be authoritatively determined by this Court.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit should be granted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

SEPTEMBER, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts (R. 28–31) is reported in 28 F. (2d) 54. The opinion of the Circuit Court of Appeals (R. 39–44) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 25, 1929. (R. 44.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the statute of limitations for the assessment and collection of taxes, provided by Section 250 (d) of the Revenue Act of 1918 and of the Revenue Act of 1921, is set in motion by the filing of a tentative income tax return.

(2) Whether an additional tax for the year 1918, assessed within the statutory period as extended by waiver and subsequent to the enactment of the Revenue Act of 1924, may be collected, pursuant to Section 278 (d) of that Act, at any time within six years of the assessment.

STATUTES INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1075, 1081–1083, are as follows:

SEC. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. * * *

SEC. 241. (a) That returns of corporations shall be made at the same time as is provided in subdivision (a) of section 227.

* * * * *

SEC. 227. (a) That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March. The Commissioner may grant a reasonable extension of time for filing returns whenever in his judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

* * * * *

SEC. 250. (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct

amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

* * * * *

(d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. * * *

* * * * *

The pertinent provisions of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, are as follows:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes * * * due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed * * *.

The pertinent provisions of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299–301, 352, are as follows:

* * * * *

SEC. 277. (a) Except as provided in section 278 [and other sections not here important] (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918 * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. Title 26, Sec. 1057.)

* * * * *

SEC. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C. Title 26, Sec. 1061.)

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C. Title 26, Sec. 1062.)

SEC. 280. If after the enactment of this Act the Commissioner determines that any

assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277. (U. S. C. Title 26, Sec. 280.)

SEC. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c):

* * * * *

(b) The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the

assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. * * * (U. S. C. Title 26, Sec. 1260.)

STATEMENT

A statement of the facts and of the errors relied on is contained in the above petition.

ARGUMENT

The petitioner contends that the tentative return was not the return required by law. Section 239 of the Revenue Act of 1918 provides that every corporation shall make a return "stating specifically the items of its gross income and the deductions and credits allowed by this title." The purpose of such a return is to furnish the taxing authorities some basis for making an assessment against the taxpayer. *Paso Robles Mercantile Co.* v. *Commissioner* (C. C. A. 9th), decided July 1, 1929 (not yet reported).

The tentative return filed by the respondent on March 14, 1919, disclosed none of this information, but contained merely the taxpayer's estimate of the total tax. (R. 10.) If this were considered the return required by law, it would be impossible for the Commissioner of Internal Revenue to comply with Section 250 (b) of the Revenue Act of 1918, which

provides that he shall examine the return and determine whether the correct amount of tax is greater or less than that shown. The information which would enable the Commissioner to make an assessment was not furnished until the completed return was filed on July 14, 1919. It must follow that the statute of limitations for the assessment should begin to run only from the filing of the completed return. Under the contrary view taken by the Circuit Court of Appeals, the filing of a tentative return, imparting no information to the Commissioner, would set the statute of limitations in motion and the five-year period for assessment might well expire even though the Commissioner had no available information to determine the correct amount of the tax.

Such a holding, we believe, is unsound. It is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Florsheim Bros. Dry Goods Co.* v. *United States,* 29 F. (2d) 895, *supra.*

The United States Board of Tax Appeals has uniformly held that the filing of a tentative return does not set the statute in motion. *Appeal of Dallas Brass & Copper Co.,* 3 B. T. A. 856; *Appeal of Matteawan Manufacturing Co.,* 4 B. T. A. 953; *Appeal of Boston Hide & Leather Co.,* 5 B. T. A 617; *Pilliod Lumber Co.* v. *Commissioner,* 7 B. T. A. 591; *Corona Coal & Coke Co.* v. *Commissioner,* 11

B. T. A. 240. *Contra: Brandon Corporation* v. *Jones* (E. D. S. C.) decided March 30, 1929 (not yet reported); *Rasmussen* v. *Brownville-Canty Carpet Co.* (C. C. A. 9th), 31 F. (2d) 89 (in which two judges refrained from expressing an opinion on the point).

If, as we contend, the statute did not start to run until the filing of the completed return, on July 14, 1919, the Government had until July 14, 1924, to assess the tax for 1918. The waiver extended this time limit to July 14, 1925. The tax was assessed on ~~July 13, 1924~~, subsequent to the effective 18-1925 date of the Revenue Act of 1924 (June 2, 1924). Therefore, the period of limitations for the collection of this tax was controlled by Section 278 (d) of the Revenue Act of 1924, which provides that the tax may be collected at any time within six years from the date of the assessment. *Russell* v. *United States,* 278 U. S. 181. The collection was made December 15, 1926, well within that six-year period.

We submit that the position taken by the District Court in construing the waiver as a contract, and as such unaffected by the Revenue Act of 1924, is untenable. *Florsheim Bros. Dry Goods Co.* v. *United States,* 29 F. (2d) 895, *supra; Loewer Realty Co.* v. *Anderson* (C. C. A. 2d), 31 F. (2d) 268; *Greylock Mills* v. *Commissioner* (C. C. A. 2d), 31 F. (2d) 655; *Bank of Commerce* v. *Rose* (N. D. Ga.), 26 F. (2d) 365.

CONCLUSION

In view of the conflict of decisions and of the importance of the questions involved, it is respectfully submitted that writ of certiorari should be issued.

CHARLES E. HUGHES, Jr.,
Solicitor General.

CLAUDE R. BRANCH,
SEWALL KEY,
BARHAM R. GARY,
Special Assistants to the Attorney General.

SEPTEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, *Petitioner.*

vs.

HOOD RUBBER COMPANY.

BRIEF OF HOOD RUBBER COMPANY IN ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FRANK S. BRIGHT,
Attorney for Hood Rubber Company.

HAROLD C. HASKELL,
CHARLES C. GAMMONS,
H. STANLEY HINRICHS,
Of Counsel.

INDEX

Subject Index

	Page
Statement of Additional Facts	1
Statement of Additional Statutes Involved	2
Question Presented	3
Argument—	
Point I—The Statute of Limitations provided by Section 250 (d) of the Revenue Act of 1918, and of the Revenue Act of 1921, was set in motion by the filing by Respondent of its income tax return on Form 1031-T	4
Argument of Point I	4–8
Point II—Even if it be assumed that the additional tax in question was timely assessed, the Revenue Act of 1924 cannot be held to enlarge the period provided by law and by the waiver agreement of January 26, 1924, between the Commissioner and the Respondent within which the tax could legally have been collected	8
Argument of Point II	8–13
Conclusion	14
Cases Cited—	
Brandon Corporation vs. Jones, 33 Fed. 2nd, 969	7
Chicago & Northwestern Railway vs. U. S., 104 U. S., 660	11
Florsheim Bros. Dry Goods Co. vs. U. S., 29 Fed. 2nd, 895	7, 12
Rasmussen vs. Brownfield-Canty Carpet Co., 31 Fed. 2nd, 89	7, 12
Russell vs. U. S., 278 U. S., 1	12
U. S. vs. Cabot, 5 Am. Fed. Tax. Rep. 6172	12
U. S. vs. Whyel (C.C.A. 3rd) 28 Fed. (2nd) 30	11

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, *Petitioner.*

vs.

HOOD RUBBER COMPANY.

BRIEF OF HOOD RUBBER COMPANY IN ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Hood Rubber Company, the Respondent in the above-entitled cause, respectfully submits that the petition of the Solicitor General on behalf of Thomas W. White, Collector of Internal Revenue, should be denied.

STATEMENT OF ADDITIONAL FACTS

It is necessary to call the attention of the Court to the omission from the petition of one fact which the

Respondent and the Circuit Court have considered to have a significant bearing upon the case.

After the Respondent had filed on March 14, 1919, its return on Form 1031-T, and had paid one-quarter of the tax estimated thereon (this payment being required by the Commissioner), but before the expiration of the time for filing the completed return, and before the completed return was filed, Respondent received from the Collector of Internal Revenue a demand for the payment of $75,000, the same being the second installment of taxes, one-quarter thereof shown to be due by the return made on Form 1031-T. On June 16, 1919, the Respondent paid this sum in consequence of said demand. (See Paragraph 3 of the Agreed Statement of Facts, R23.)

ADDITIONAL STATUTES INVOLVED

The Respondent feels obliged to call the Court's attention to the omission of the Solicitor General to include in the statutes cited by him Section 250 (a) of the Revenue Act of 1918. The Circuit Court of Appeals refers specifically to this section as one of the bases for its finding in favor of the Respondent. This section reads as follows:

> "Sec. 250 (a). That except as otherwise provided in this section and sections 221 and 237, the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the

ninth month, after the time fixed by law for filing the return. Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so provides in granting the extension. In any case in which the time for the payment of any installment is at the request of the taxpayer thus postponed, there shall be added as part of such installment interest thereon at the rate of one-half of one per centum per month from the time it would have been due if no extension had been granted, until paid. If any installment is not paid when due, the whole amount of the tax unpaid shall become due and payable upon notice and demand by the Collector.

"The tax may at the option of the taxpayer be paid in a single payment instead of in installments, in which case the total amount shall be paid on or before the time fixed by law for filing the return, or, where an extension of time for filing the return has been granted, on or before the expiration of the period of such extension."

QUESTIONS PRESENTED

On Page 6 of the Solicitor General's Petition the two issues are set forth, phrased in most general terms. The Respondent believes that the issues there framed do not present the questions in their exact and specific form, and therefore would rephrase them as follows:

(1) Whether the statute of limitations for the assessment and collection of taxes, provided by Section 250 (d) of the Revenue Act of 1918, and of the Revenue Act of 1921, was set in motion by

the filing of an income tax return on Form 1031-T, that being the form prescribed by the Commissioner of Internal Revenue for use at the time it was filed.

(2) Whether, assuming assessment of an additional tax for the year 1918 to have been timely made within the provisions of an instrument in writing signed by the Commissioner and the taxpayer extending the time for the determination, assessment and collection of the taxes in question for one year after the expiration of the statutory period of limitation, the Revenue Act of 1924, enacted subsequent to the execution of this instrument, but prior to the expiration of the year's period therein mentioned, operated to enlarge the period within which collection of said tax could legally be made.

ARGUMENT

POINT I

The Statute of Limitations provided by Section 250 (d) of the Revenue Act of 1918, and of the Revenue Act of 1921, was set in motion by the filing by Respondent of its income tax return on Form 1031-T.

The Respondent filed on March 14, 1919, a return on Form 1031-T. This form was furnished by the Commissioner of Internal Revenue and was the only form at that time available to taxpayers for making the return prescribed by law.

It is apparent from an analysis of Section 227 (a), 239 (a) and 250 (a) of the Revenue Act of 1918 that a return must be filed on or before March 15th in each year, unless an extension of time is authorized by the Commissioner. Wherever the word "return" is referred to in these sections it has a definite article and

a single subject and, therefore, can mean only one return, namely, the return to be filed on or before March 15, which return sets in motion the Statute of Limitations.

It is urged on behalf of the Petitioner that since this return on Form 1031-T did not state specifically the items of gross income and the deductions and credits allowed by the Act, but merely requested an extension of time, it cannot be *the* return contemplated by the Act, and that the completed return (filed by the Respondent on July 14, 1919) was the return which set in motion the Statute of Limitations.

While the law requires a return to be filed on March 15 in each year it does not require that the paper on which this return is made shall contain within its four corners all items of "gross income deductions and credits," and Respondent on that day initiated a proceeding by which the Commissioner could secure at any time the said items. Even if it were not a completed paper, still it was the return then required by the Commissioner.

It is common knowledge that during the period from January 1st to July 14th, 1919, the Commissioner of Internal Revenue issued, through the public press and otherwise, several notices with respect to the filing of returns by the taxpayer. The language of these notices revealed that the Commissioner himself contemplated the filing of a return by the taxpayer on or before March 15th to be later amended or revised or completed. The law is clear that where an original return is filed and later by a subsequent return is amended, voluntarily or upon requirement by the law,

the tolling of the Statute of Limitations commences with the filing of the original return.

It is urged on behalf of the Petitioner that this return on Form 1031-T was merely a request for an extension of time by the taxpayer for the filing of a definite return.

Section 227 (a) authorized the Commissioner to grant a reasonable extension of time for filing returns whenever in his judgment good cause exists. But this authority to grant an extension is qualified in a later section of the same Act; namely, Section 250 (a) which provided generally for the payment of the tax in installments, and then specifically dealt with the situation in regard to payment where an extension of time has been granted, as follows:

> "Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installment shall not be postponed unless the Commissioner so provides in granting the extension."

In the instant case not only was the Respondent compelled to pay one-quarter of the tax estimated to be due by the return on Form 1031-T, but also before the time for filing a completed return had expired it was required to pay an additional installment of like amount.

But section 250 (a) is clear that in the event of an extension of time the Commissioner has no option but to extend also the time for payment of the first installment of the tax. From the Commissioner's point of

view the law authorized him to do one of two things only; either to require and receive a *return* on or before March 15th or *unconditionally* to grant an extension of time for the filing of a return. If he elects the latter he has no authority to require the filing of any document whatever (except a mere request for an extension of time) nor to demand payment of any part of the tax until the period of the extension which he has granted has elapsed.

Since it is to be presumed that where an official has acted his act has been legally done, there is no alternative but to hold that the return on Form 1031-T could not have been a request for an extension of time but must have been *the return* contemplated by law.

The problem presented in this petition is very carefully analyzed in a thoroughly reasoned and logical opinion in the court below. In the very week in which it was argued in the circuit court the United States District Court for the eastern district of South Carolina rendered in *Brandon Corporation vs. Jones,* 33 Fed. 2nd, 969, a most carefully and elaborately reasoned opinion. The holding of the Circuit Court of Appeals of the 9th circuit in *Rasmussen vs. Brownfield Canty Carpet Company,* 31 Fed. 2nd, 89 also supports the decision of the Circuit Court for the first circuit. In the latter decision the Circuit Court likens the situation to the case of an amended return and holds that the tentative return must be considered to start the period of limitation.

Opposed to these three carefully reasoned cases is only the decision of the court in the *Florsheim Brothers Dry Goods Company vs. U. S.,* 29 Fed. 2nd, 895. In

that case the opinion, without giving any reason at all for the decision, merely states a conclusion that the running of the statute commences from the date of the filing of the completed return.

The Respondent is aware that there are several Board of Tax Appeals cases which support the contentions advanced by the Solicitor General in his Petition. The Board of Tax Appeals is, however, an administrative and not a judicial body, and it is submitted that not only those cases but the Florsheim case are answered by the reasoning of the Circuit Courts in this and the Rasmussen case and the District Court in the Brandon case.

The Respondent respectfully submits that the only logical interpretation of those sections of the Revenue laws of 1918 and 1921 which deal with the filing of the return points to the tentative return filed on March 14, 1919, as *the return* contemplated. It is further respectfully submitted that the weight of authority supports this contention.

Would not it be as reasonable for the court to hold that where a suit had been filed and the defendant demanded a bill of particulars, the bill of particulars would start the running of the statute?

Point II

Even if it be assumed that the additional tax in question was timely assessed, the Revenue Act of 1924 cannot be held to enlarge the period provided by law and by the waiver agreement of January 26, 1924, between the Commissioner and the Respondent within which the tax could legally have been collected.

On January 26, 1924, the Respondent and the Commissioner of Internal Revenue entered into an agreement (the full text of which is set forth on Page 2 of the Solicitor General's Petition) wherein it was agreed that the period of limitation for the determination, assessment *and collection* of taxes for the year 1918 be extended for one year after the expiration of the statutory period of limitation provided by law.

By Section 250 (d) of the Revenue Act of 1918 and of the Revenue Act of 1921 the statutory period of limitation upon assessment and collection of the tax expired five years after the date of the filing of the return.

Had it not been for this agreement, the period for assessment and collection of the taxes would have expired on March 14, 1924, or July 14, 1924, according to the view taken on the question whether the filing of the tentative return or the completed return started the tolling of the Statute of Limitations. The agreement extended the period for one year. Assessment of the tax in question was made on March 18, 1925, and collection was enforced by distraint on December 15, 1926.

It is respectfully submitted that from and after the date of this agreement the respective rights of the Respondent and the Petitioner were limited by its terms. The agreement was one which the Commissioner was authorized by law to make, and it was entered into in good faith by both parties.

Respondent contends that the term within which this additional tax could legally be assessed and col-

lected was limited either by the Revenue Act of 1921, the law then in force, or by the terms of this written agreement. If we assume the latter, although the assessment was timely made (conceding for the purpose of argument that the filing of the completed return started the running of the Statute), collection was not enforced until long after the period of limitation created by the agreement had expired.

On the other hand, if this agreement is not to control, then the assessment was not timely made, for the last date upon which assessment could be made under any of the Revenue Acts, and under a construction of the facts most favorable to the Petitioner on the first issue, was July 14, 1924.

Either there is no virtue at all in the agreement, or else it must be taken to mean what it says. The Petitioner cannot be allowed to blow hot and cold at the same time and say that the terms of the agreement are valid with respect to the extension of time for assessment but that the limitation on the time for collection is meaningless.

It has been suggested, on behalf of the Petitioner, that although the agreement of January 26, 1924, constituted a valid and binding agreement between the parties, the Revenue Act of 1924, subsequently enacted, modified the terms of this contract so far as the obligation of the Commissioner was concerned.

The Respondent submits, in answer to this contention, that regardless of whether or not Congress had the power to alter this contract, there is no language in the Revenue Act of 1924, which expressly modifies

it. An entirely analogous situation is presented in the case of *Chicago & Northwestern Railway v. United States* 104 U. S. 660 wherein it was held that Congress could not vary the terms of a contract to which the Government was a party, so that while the Government's rights and remedies remain unchanged, new obligations were imposed upon the other contracting party.

In spite of the dilemma in which the Petitioner is placed by the agreement of January 26, 1924, it has been urged on his behalf that since the time for assessment of the tax in question had not expired when the Revenue Act of 1924 was enacted, that law imposes the limitation upon assessment and collection of taxes, replacing all earlier laws and agreements.

Such a construction necessarily gives a retroactive effect to the provisions of this Act which cannot be gathered from its language. On the other hand, it is apparent from a reading of the pertinent provisions of the Act that Congress intended the 1924 Act to be a point of departure from the earlier laws, leaving whatever existed under the earlier laws to be worked out in accordance with their provisions, and framing a new act for the future.

This interpretation is supported by the case of *United States v. Whyel (C. C. A. 3rd)* 28 Fed. (2nd) 30. The opinion in that case quotes the proceedings before the Committee of Finance of the Senate which had under consideration the Revenue Act of 1924 before it became law which plainly indicated the understand-

ing of Congress that this Act was not to be retroactive.

Other cases which point the same way are:

Russell v. United States 278 U. S. 1.

Rasmussen v. Brownfield-Canty Carpet Company—supra.

United States v. Cabot 5 Am. Fed. Tax. Rep. 6172.

The only case which is squarely contra is *Florsheim Bros. Dry Goods Company v. United States, supra.* The Solicitor General in his Petition has cited several other cases in support of his argument on this issue. It is submitted, however, that the cases which he cites involve later Revenue Acts, and that the question here in issue is so narrow and specific that no assistance is to be derived from the reasoning in such cases.

As shown above, there are two distinct and separate issues in this case. If the Respondent prevails upon either of these issues, it is entitled to judgment. The District Court, in finding for the Respondent upon one of these issues, considered it unnecessary to analyze the other issue. In the Circuit Court of Appeals, this other issue was examined, and resolved in favor of the Respondent, the Court not discussing the merits of the issue which had been passed upon by the District Court.

The result of this is that the whole case, and not merely one feature of it, has already been submitted to judicial analysis. There are, in effect, two opinions, each on a different issue, both in favor of the Respondent.

It is respectfully submitted that this fact goes a long way toward dispelling the possibility that error may exist in the decisions below because of a conflicting decision in the Circuit Court of Appeals for the Fifth Circuit. But if any doubt still exists as to which decisions, those of the Courts of the First Circuit on the one hand, or those of the Courts of the Fifth Circuit on the other hand, set forth the true rule of law, a careful reading of the opinions should leave no doubt whatever, but that the result arrived at by the former was reached after careful and exhaustive analysis of the facts and the law, whereas the Fifth Circuit Court considered the problem less thoroughly.

The Solicitor General remarks in his Petition that the instant case is of general importance. The Respondent takes issue with him on this point. The question involved is the application of several Internal Revenue Acts (all of which have been long since extensively modified), to a unique set of facts which, under existing laws and regulations could not reoccur. The few general principles of law which have been invoked to aid in solving the problem are well known and, as principles of law, not in the least debatable. A more narrow or more technical question than that presented by the case at bar could scarcely be conceived, wherefore, it is respectfully submitted that its authoritative determination by this Court would not create precedent to guide taxpayers and the Treasury Department in the future, but would merely endorse the reasoning of one or the other of the Courts which have rendered conflicting decisions.

CONCLUSION

In view of the foregoing it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. BRIGHT,
Attorney for Hood Rubber Company.

HAROLD C. HASKELL,
CHARLES C. GAMMONS,
H. STANLEY HINRICHS,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1929.

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

HOOD RUBBER COMPANY,

Respondent.

RESPONDENT'S BRIEF

FRANK S. BRIGHT,
Attorney.

HAROLD C. HASKELL,
Of Counsel.

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INDEX

	PAGE
Statement of the Case	1
Opinions Below	2
Statement of Facts	2
Summary of Argument	5
I. Form 1031-T Was "The Return" Within the Meaning of The Taxing Statutes	6–13
1. Form 1031-T Required an Estimate of the Amount of Tax Due and Required the Payment of at Least One-Quarter of This Amount at the Time of Filing	6
2. Form 1031-T Was a Formal Document Prescribed and Furnished by the Commissioner, Containing Facts and Figures and Requiring Verification by the Principal Officers of the Taxpayer Corporation	10
3. Since the Requirement Relating to the Return Is Part of a Taxing Statute, Any Doubt With Reference to the Effect of Acts Done Pursuant Thereto Must Be Resolved in Favor of the Taxpayer	13
II. The Period of Limitation Applicable to the Collection of the Taxes in Question Was Established by the Agreement of January 26, 1924, and Said Agreement Remained Unaffected by the Subsequently Enacted Revenue Act of 1924	18–34
1. The So-Called "Waiver" of January 26, 1924, Was a Contract Requiring Determination, Assessment and Collection of the Tax Prior to the Time When the Tax Was Collected	18
2. Congress Could Not by Subsequent Legislation Constitutionally Alter the Terms of the Contract of January 26, 1924	28
Conclusion	34
Appendix A. Decision of Lowell, District Judge	37

CASES CITED

	PAGE
Bank of Commerce v. Rose, 26 Fed. (2d), 365	33
Bowers v. New York and Albany Lighterage Co., 273 U. S., 346	13
Brandon Corporation v. Jones, 33 Fed. (2d) 969	9, 1[illegible], 14
Campbell v. Holt, 115 U. S., 620	28
Chadbourne & Moore v. Commissioner, 16 B. T. A., 961	20
Cope v. Cope, 137 U. S., 682, 687–8	21
Eidman v. Martinez, 184 U. S., 578	13
Estate of Sherman v. Commissioner, 16 B. T. A., 786	20
Farmers & Mech. National Bank v. Dearing, 91 U. S., 29, 36	21
Florsheim Bros. Dry Goods Co. v. United States, 26 Fed. (2d) 505	3, 5, 17, 1[illegible], 33
Gould v. Gould, 245 U. S., 151	13
Greylock Mills v. Commissioner, 31 Fed. (2d), 655	20
Hood Rubber Co. v. White, Collector, 28 Fed. (2d), 54, decision	37
Home for the Friendless v. Rouse, 8 Wall., 430	32
Johnson v. Southern Pacific R. Co., 196 U. S., 1, 20–1	21
Loewer Realty Co. v. Anderson, 31 Fed. (2d) 268	34
Mabel Elevator Co. v. Commissioner, 2 B. T. A., 517	11
Murray v. Charleston, 96 U. S., 432	32
National Life Ins. Co. v. United States, 277 U. S., 508	32
National Refining Co. v. Commissioner, 1 B. T. A., 236	[illegible]1, 17
New Jersey v. Wilson, 7 Cranch, 164	32
N. Y. C. R. Co. v. Lazarus, 278 Fed., 900	28
Oak Worsted Mills v. United States, Ct. Cl., (decided Dec. 2, 1929, not yet reported)	4, 16

PAGE

Paso Robles Mercantile Co. v. Commissioner, 33 Fed. (2d) 653, Certiorari denied Oct. 4, 1929 16
Schwab v. Doyle, 258 U. S., 529 13
Sinking Fund Cases, 99 U. S., 700 29
Stange v. United States, Ct. Cl. (decided Nov. 4, 1929, not yet reported) 20, 34
Thomas v. United States, 22 Fed. (2d), 1000 11
Tiger v. Western Development Co., 221 U. S., 286, 308–9 21
Union Pacific R. Co. v. Bowers, 24 Fed. (2d), 788 11
Weedin v. Chin Bow, 274 U. S., 657, 667–8 21
Wetmore v. Markoe, 196 U. S., 68, 76–7 21
Wilmington Loan & Trust Co. v. Commissioner C. C. A. (decided Nov. 22, 1929, not yet reported) 16

TEXT BOOKS CITED

22 C. J., 130, § 69 (c) 8

STATUTES CITED

Revenue Act of 1918, 40 Stats., 1057,
§ 227 (a) 6, 7, 10, 11, 12, 14
§ 239 (a) 6, 7, 10, 12, 14
§ 241 (a) 6
§ 250 (a) 7
§ 1309 ..... 7, 11, 14
Revenue Act of 1921, 42 Stats., 227,
§ 250 (d) 18, 19, 21
Revenue Act of 1924, 43 Stats., 253, § 277 (a) 21
§ 278 (c) 19, 22
Revenue Act of 1926, 44 Stats., 2, § 277 (a) 21
§ 278 (c) (d) (e) 19, 22, 24
Revenue Act of 1928, 45 Stats., 795,
§ 276 (b) (c) 19, 21, 22
§ 506 (a) 19, 21, 22

IN THE

Supreme Court of the United States

October Term, 1929.

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

HOOD RUBBER COMPANY,

Respondent.

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This is a suit brought by the Respondent in the District Court for the District of Massachusetts for the recovery of additional income and excess-profits taxes for the year 1918, in the sum of $39,043.99 (together with interest thereon from Deecember 15, 1926), which taxes were collected by distraint by the Petitioner.

The suit was commenced on January 12, 1928 (R. p. 1).

By stipulation in writing (R., p. 14) the parties waived a trial by jury. The case was tried upon an agreed statement of fact (R. p. 14 et seq.) on July 26, 1928, the Honorable James A. Lowell, District Judge, presiding.

The court, in an opinion handed down on August 29, 1928 (R. p. 18 et seq.), ordered judgment to be entered for the Respondent.

Motion for entry of judgment forthwith (R. p. 18) was allowed on November 27, 1928, and judgment was that day entered for the Respondent in the sum of $39,043.99, together with interest amounting to $4,568.15, and its cost of suit (R. p. 18).

On October 8, 1928, the Petitioner duly filed its Bill of Exceptions (R. pp. 21–22), which said bill was allowed on November 14, 1928 (R., p. 23).

On January 24, 1929, the Petitioner duly filed its Petition for Appeal to the United States Circuit Court of Appeals for the First Circuit, which said petition was allowed (R., p. 23). Assignment of Errors was duly filed by the Petitioner on January 24, 1929 (R. p. 24).

The cause came on to be heard before the Justices of the said United States Circuit Court of Appeals for the First Circuit on April 16, 1929, and in an opinion handed down on June 25, 1929 (R., p. 25 et seq.), said Court affirmed the judgment of the District Court, judgment thereon being entered on said June 25, 1929 (R. p. 31).

The Petitioner on September 23, 1929, filed in this Court a Petition for Writ of Certiorari to the said United States Circuit Court of Appeals for the First Circuit, which petition was granted on October 28, 1929 (R. p. 31).

STATEMENT OF THE FACTS

The Respondent on March 14, 1919, filed with the proper Collector of Internal Revenue an income and excess-profits tax return for the calendar year 1918. Said return was designated as a "Tentative Return"

and the form used was the form prescribed and furnished by the Treasury Department, known as "Form 1031-T" (R. pp. 14, 15). Exhibit A, R. p. 5.) The precise form of this return is the same as that found in the brief for Petitioner (between pages 10 and 11) in the case of Florsheim Brothers Dry Goods Company v. United States of America, which said case has by order of the Court been joined with this case, and which said form is incorporated herein by reference.

The Respondent paid at the time of filing said return, on account of taxes due, the sum of $75,000, and upon demand from the Collector of Internal Revenue paid on June 16, 1919, the further sum of $75,000, the same being the second instalment of taxes due as shown by the return filed on March 14, 1919 (R. p. 15).

The time for filing a completed return for the calendar year 1918 having been extended by the Commissioner of Internal Revenue to July 14, 1919, the Respondent on said later date filed such a completed return, from which it appeared that the total tax due from the Respondent for the calendar year 1918 amounted to $169,772.65. The Respondent, having prior thereto paid $150,000 on account of said tax, duly paid the balance, i. e., $19,773.65, on December 12, 1919 (R. p. 15).

On January 26, 1924, the Respondent and the Commissioner of Internal Revenue entered into an agreement the pertinent provisions of which are as follows:

"January 25, 1924.

"Income and Profits Tax Waiver

"In pursuance of the provisions of Subdivision (d) of Section 250 of the Revenue Act of 1921,

> Hood Rubber Company and Affiliated Companies, of Watertown, Massachusetts, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Companies for the year nineteen hundred and eighteen under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts. * * * This waiver is in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the bureau, within which assessments of taxes may be made for the year or years mentioned." (Exhibit B, R. p. 7.)

This agreement was duly executed by both parties. (R. p. 15.)

Thereafter the Commissioner of Internal Revenue determined that additional taxes of $249,131.96 were due from the Respondent for the calendar year 1918, and notified the Respondent to that effect on February 16, 1924. The amount of said additional taxes was subsequently reduced to $191,978.98, which amount was assessed to the Respondent on March 18, 1925. (R. p. 15.)

The amount so assessed was again reduced to $49,405.34. The Petitioner applieed to the reduction of this amount a credit of $10,361.35 which had previously been allowed to Respondent as an overassessment for the year 1919, leaving as the net amount of additional taxes alleged to be due the sum of $39,043.99. (R. p. 16.)

Thereafter a warrant of distraint issued for the collection of said sum, and, acting under said warrant, on December 15, 1926, a Deputy Marshal of the United States levied upon and seized money of the

Respondent in the amount of $39,043.99 and paid said money so seized to the Petitioner.

On December 15, 1926, Respondent made a formal protest to the Petitioner, and demanded the return of the money so seized. (Exhibit C, R. p. 8.) (R. p. 16.)

On January 10, 1927, the Respondent filed with the Petitioner claim for refund of said sum of $39,043.99 (Exhibit D, R. p. 8), which claim for refund was rejected by the Commissioner of Internal Revenue on November 3, 1927. (Exhibit E, R. p. 13.) (R. p. 16.)

On January 12, 1928, the Respondent brought this action to recover the sum so levied upon and seized, together with interest thereon from December 15, 1926.

ARGUMENT

Since the issues in this case are precisely the same as in the case of Florsheim Company v. United States, above referred to, and since the cases are to be presented together, the Respondent herein adopts in toto the arguments set forth in the Petitioner's Brief in said Florsheim Case and asks that they be incorporated herein without reiteration.

The following may be considered as supplementing Petitioner's Brief in said Florsheim case:

The issues raised are the same as in the Florsheim case, viz.:

I. Whether the return on Form 1031-T was "the return" within the meaning of the Statutes?

II. Whether the period of limitation applicable to the collection of the taxes in question was established by the agreement of January 26, 1924, and if so,

whether said agreement remained unaffected by the subsequently enacted Revenue Act of 1924?

I.

FORM 1031-T WAS "THE RETURN" WITHIN THE MEANING OF THE TAXING STATUTES.

1. Form 1031-T Required an Estimate of the Amount of Tax Due and Required the Payment of at Least One-Quarter of This Amount at the Time of Filing.

Section 239 (a) of the Revenue Act of 1918 (40 Stat. 1057) provided:

> "That every corporation subject to taxation under this title * * * shall make **a return** stating specifically the items of its gross income and the deductions and credits allowed by this title. **The return** shall be sworn to by the president, vice-president or other principal officer and by the treasurer or assistant treasurer."

Section 241 (a) of the same Act (40 Stat., 1075) provided that the time for filing such return should be the same as provided in Section 227 (a) (40 Stat., 1081), which reads as follows:

> "That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if **the return** is made on the basis of the calendar year, then **the return** shall be made on or before the fifteenth day of March."

To make proper provision, however, for those taxpayers who for good and sufficient reasons were unable to comply with the requirement as to the time of the filing of their returns it was provided in Section 227 (a) of the same Act (40 Stat., 1075) that—

> "The Commissioner may grant a reasonable extension of time for **filing** returns, whenever in his judgment good cause exists."

And Section 250 (a) of the same Act (40 Stat., 1082) makes the further provision that—

> "Where an extension of time for filing a return is granted, the time of payment of the first installment **shall be postponed** until the date of the expiration of the period of extension."

The above-quoted sections of the law are definite and certain that a single return was contemplated. For example, Section 239 (a) reads "shall make **a** return"; Section 227 (a) provides: "**The** return shall be made on or before the fifteenth day of March"; and Section 250 (a) reads: "Where the extension of time for filing **a** return is granted"; all of which clearly indicates that not any return or many returns, but **one return,** is required of the taxpayer, and Section 227 (a) is equally definite and certain that it is the time for **filing returns** which the Commissioner is authorized to extend.

Section 1309 of said Revenue Act of 1918 (40 Stat. 1143) provides:

> "That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act."

In accordance with the foregoing Statute, the Commissioner prescribed that returns be made by corporations for the calendar year 1918 on Form 1031-T and supplied said forms to all corporation taxpayers. The form required an estimate of the corporation's tax liability for said calendar year of 1918 and further provided that one-quarter of the tax estimated to be due must be forwarded by the taxpayer with said

Form 1031-T at the time it was filed. That form also contained the following statement:

> "An extension of forty-five days in the time allowed for filing a **completed** return is requested."

From the foregoing statutes which were in effect on March 14, 1919, when the Respondent filed document Form 1031-T, the Commissioner had authority to do one of two things: First, he could require the taxpayer to make a return on the form which he (the Commissioner) prescribed and at the time of filing said return require the payment of at least one-quarter of the tax shown to be due in such return; or, second, he could extend the time for filing a return, in which case the payment of the first installment must of necessity be postponed until the date of the expiration of the period of such extension. **No middle course was open to the Commissioner.**

It should be noted that the statute relating to an extension of time is not permissive but mandatory. If an extension is granted, payment of the first installment **shall be postponed.**

It of necessity follows that either the document filed by the Respondent on March 14, 1919, and accompanied by $75,000, as the payment of the first installment of the tax estimated to be due, was the return contemplated by the taxing statutes, or that in requiring said document to be filed and said money to be paid, the Commissioner has exceeded his authority.

It is a familiar principle of law that, where an official has acted, his act will be presumed to have been legally done. This is succinctly stated in volume 22 of Corpus Juris, at page 130, section 69 (c):

"There is always a presumption that official acts or duties have been properly performed, and in general it is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his duty was legally done * * *."

See also cases therein cited in support of this propostion.

From which it necessarily folows that the return made on Form 1031-T could not have been merely a request for an extension of time for filing **the return** as is now contended by the Petitioner, but must have been **the return** required by the taxing statutes and hence the return which started the running of the period of limitations.

In the case of Brandon Corporation v. Jones, 33 Fed. (2d) 969, a case on all fours with the case at bar, the Court speaking of the tentative return says (p. 971):

"It is common knowledge that the Revenue Act of 1918 constituted the greatest single levy of any tax in the history of the country, and that the financial condition of the government was such that it could not permit any extension of time for the collection of the first installment. It was for its own benefit largely that the government devised the plan of tentative returns. This procedure established by the Commissioner of Internal Revenue under the rulings of February 13, 1919, and February 27, 1919, expressly required therefore the filing of a return on March 15, 1919, and expressly provided that there was no extension beyond that date of the time for the payment of the first installment. The Commissioner therefore elected not to grant any extension of time for filing these returns, and it necessarily follows that the returns which he then required must be deemed the return contemplated by the statute whether termed merely a tentative return or not."

2. Form 1031-T Was a Formal Document Prescribed and Furnished by the Commissioner, Containing Facts and Figures and Requiring Verification by the Principal Officers of the Taxpayer Corporation.

It is extremely significant that the Commissioner of Internal Revenue as a matter of practice has never issued a Regulation and has never demanded that a mere request for extension of time for filing a tax return be in any sense a formal document. An informal letter, or even a telegram, received from a taxpayer and stating most informally the reason for requesting an extension of time has, as a matter of practice, been deemed sufficient for this purpose by the Commissioner.

There is no requirement in the taxing statute itself that this request be in any sense a formal document, the only language in the statute pertaining to the matter being that quoted above, namely:

> "The Commissioner may grant a reasonable extension of time for filing returns, whenever in his judgment good cause exists."

On the other hand, Congress has prescribed in Section 239 of the Revenue Act of 1918 (quoted above) the specific requirements of a return. And the Petitioner is basing its argument that Form 1031-T cannot be the return required by the statute upon the contention that it did not conform literally to these requirements and did not state "specifically the items of its gross income and the deductions and credits allowed * * *."

Attention is called to the fact, however, that there is nothing in this section which required that all of this information must be contained within the four corners of any one particular document, and the re-

quirements of said Section 239 must be read together with the requirements of Section 1309, providing that the Commissioner shall make—

> "all needful rules and regulations for the enforcement of the provisions of this Act."

The Respondent contends that within the limits of reason the Commissioner may require the information with reference to the items of gross income and deductions and credits as provided in Section 239 on one or more prescribed forms, and may, if for the purpose of his office it is deemed advisable, provide different times for the filing of each of these forms. But since Congress has required the taxpayer to file but one return, it of necessity follows that the first document required by the Commissioner, and containing such facts and figures as he may require, is **the return,** and that the subsequent information merely completes or supplements the return.

This position is supported by the following cases:

National Refining Company, 1 B. T. A. 246.
Mabel Elevator Company, 2 B. T. A. 517.
Union Pacific Railroad vs. Bowers, 24 Fed. (2d) 788.
Thomas vs. United States, 22 Fed (2d) 1000.

Again quoting from the case of Brandon Corporation v. Jones (p. 972):

> "The law clearly contemplates, so far as the starting of the statute of limitations is concerned, but one return. That return may not be complete in all particulars. It may be the subject of amendment; but if it is presented bona fide, and is a return for any purpose under the statute, then it must be a sufficient return to start the running of the statute. The government cannot blow hot and cold. It cannot say to the taxpayer, 'File a paper which we know to be incomplete and does not give all the information

> required by law, and pay us the first installment and we will allow you later to complete your return, and readjust the amount of taxes in accordance with the completed return,' and then say later that 'the first paper which you filed was no return and the statute must start from the date of the final completed return.' It cannot say, when its interests require it to do so, that the tentative return is a return, and then, when its interests require the contrary, say that it is no return."

The situation is very analogous to the beginning of an action in court. The Declaration or Bill of Complaint originally filed by the Plaintiff often contains very little information as to the facts and circumstances which are the basis of the action. It may be necessary to amend these first documents very materially before the parties are at issue. But it never has been contended that legal proceedings have not commenced until all the required information has been filed in the court.

If it be urged that the figure given by the taxpayer as the estimated amount of its tax liability is so trifling and of so little consequence that it cannot be said to comply in any sense with the provisions of Section 239, attention is called to the instructions issued by the Commissioner just prior to the time set for filing these returns, and particularly to the following sentence therefrom:

> "It is urged by the Bureau that the estimates be computed on the most exact basis available."

The labor to a large taxpayer in making an estimate "on the most exact basis available" would be anything but trifling and might, in many instances, require said taxpayer accurately to estimate his gross income and his deductions and his credits, as is provided in Sec. 239, before he could comply with this

requirement. **Certainly, the Commissioner had no authority to require this exact computation merely as a condition precedent to granting an extension of time for filing a return.**

So the Commissioner in requiring the taxpayer to file the information sought by Form 1031-T, and in requiring the document to be properly authenticated by the proper officers of the taxpayer, again exceeded his authority unless the taxpayer was making its return. And the presumption of legality again applies and determines that Form 1031-T was **the return** required by the taxing statutes.

3. Since the Requirement Relating to The Return is Part of a Taxing Statute, any Doubt with Reference to the Effect of Acts Done Pursuant Thereto Must Be Resolved in Favor of the Taxpayer.

If, after a consideration of all the arguments that can be advanced, the Court should find it is in doubt as to whether or not Form 1031-T constituted **the return** described in the taxing statutes, the benefit of this doubt must be given to the taxpayer:

See Gould v. Gould, 245 U. S. 151, 62 L. Ed. 211.

Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, 71 L. Ed. 676.

Eidman v. Martinez, 184 U. S. 578, 46 L. Ed. 697.

Schwab v. Doyle, 258 U. S. 529, 66 L. Ed. 747.

and so resolving this doubt in favor of the taxpayer, the Court will come to the conclusion that Form 1031-T was **the return** described in the taxing statutes and consequently was the return which started the running of the period of limitations.

Again quoting from Brandon Corporation v. Jones, supra, pages 972-3:

> "It must be borne in mind also that if there is any room for doubt as to the construction or application of these taxing statutes, such doubt is to be resolved in favor of the taxpayer."

To meet the foregoing arguments the Petitioner stresses the language of Section 239 of the Revenue Act of 1918, which provides for a return "stating specifically the items of its gross income and the deductions and credits allowed by this title". As was above pointed out, however, there is nothing in the foregoing language which requires that all these items must be contained within the four corners of any particular document. And furthermore Section 239 must be read in conjunction with Section 1309 of the same Act, which gives the Commissioner authority to make "all needful rules and regulations for the enforcement of the provisions of this Act." The Respondent therefore contends that when the Commissioner prescribed and furnished Form 1031-T the taxpayer was obligated to file this particular document; it was a "needful rule and regulations" for the enforcement of the provisions of the Act which the Commissioner was expressly authorized to make.

In support of its position the Petitioner further quotes at length in its brief (p. 12) from the case of Oak Worsted Mills against the United States. This case develops at length the argument that since Form 1031-T did not contain all the items seemingly required in Section 239, it could not be the return contemplated by the taxing statutes and contains this sentence, "It (Form 1031-T) specifically requested an extension of time for filing 'the return', and in this connection we are at a loss to understand what return could possibly be meant except the return re-

quired by law". The learned Court, however, overlooks the very significant fact that the taxpayer in Form 1031-T did not, as stated, request an extension of time for filing **the** return, but requested an extension of time "for filing a **completed** return".

The court in said Oak Worsted Mills case then goes on to say, "The statute provided that the tax shall be assessed within five (5) years 'after the return was due or made.' What return? The return not authorized by law and not referred to in the statute? Clearly not." It would seem that from this admittedly correct premise the court would have drawn the conclusion that since the Commissioner could require but one return, that therefore the return which he did require, namely, Form 1031-T, was **the return.** But it is submitted the court's reasoning is entirely faulty when from this premise the conclusion is drawn that since there is no provison in the law for a tentative return the Commissioner, in prescribing and requiring that form of return, was not requiring the return contemplated by the statutes.

In the opinion in the Oak Worsted Mills Case also the court repeatedly refers to the procedure prescribed in connection with Form-1031-T as "an invention of the Commissioner" and states that this plan "was a concession to the taxpayer beyond any requirement of the law." The Respondent respectfully inquires where in the taxing statutes any authority is given the Commissioner to make "inventions" and to "make concessions to taxpayers beyond any requirement of the law." The Commissioner is expressly authorized to make rules and regulations; he is not permitted to make "inventions" and "concessions".

But what concession can possibly be made to a taxpayer when he is required to estimate his tax liability

on "the most exact basis available" and to make payment of at least one-quarter of the amount shown in said estimate to be due? To call such a procedure a "concession" to the taxpayer is a misuse of language.

The procedure outlined by the Commissioner in connection with Form 1031-T was solely for the benefit of the Government, was prescribed to meet its needs and the act of the Commissioner done pursuant thereto are fully authorized by the taxing statutes, as is more fully developed in Petitioner's brief in the Florsheim case.

But the gist of the whole opinion in the Oak Worsted Mills case is set forth in the following sentence (government's brief p. 16), "The proposition on the part of the Commissioner was simply that if the taxpayer would file an estimate of his taxes and a request for extension of time for filing return and make payment of one-fourth of the estimated tax, the extension would be granted, **and he had a right to make these requirements.**" The fallacy of this statement has been developed at length in the foregoing brief. Congress did not give the Commissioner authority to require a taxpayer to file an estimate of his taxes as a condition precedent to granting an extension; it did not give the Commissioner authority to require the payment of one-fourth of the estimated tax due as such condition precedent; it expressly provided that if the Commissioner extended the time for filing a return the time was thereby extended for payment of any sum of money. Since the Oak Worsted Mills case is based on this false premise its conclusions should have no weight in the present case.

Cases similar to the Paso Robles case and the Wilmington Loan & Trust Company case (p. 17, government's brief), where a taxpayer makes a return

on an improper basis, have no application whatever in the present case except possibly to show that where the rules and regulations of the Commissioner are not complied with the so-called return is not operative to set in motion the period of limitations. And to push to its logical conclusion this line of reasoning would seem to support Respondent's position that where such rules and regulations of the Comissioner are in all respects complied with the return so filed would operate to set in motion the period of limitations.

The Petitioner argues (pp. 11, 12, government's brief) that because the tentative return did not set forth all the information the Commissioner might require for making an assessemnt that the period for assessment might expire before the necessary information was furnished. But attention is invited to the fact that Form 1031-T outlined a complete and perfect plan of procedure. It made a provision for a present estimate and payment and then made further provision for furnishing more detailed information, and the supplemental information furnished to give the Commissioner all the required data was filed nunc pro tunc as of the date of filing Form 1031-T. (See Appeal of National Refining Company, 1 B. T. A., 236.)

Furthermore, the condition suggested of the expiration of the time for making an assessment before the necessary information was furnished could never arise except by the negligence of the Commissioner, for the Commissioner has at all times under all tax statutes had the authority to examine the books of the taxpayer and if necessary to make a return for him.

The arguments above presented, together with those in Petitioner's brief in the Florsheim case, would seem

to make but one answer possible to the first question, viz: that the return filed by the Respondent on Form 1021-T was **the return** contemplated by the Statutes and that the period of limitations for assessment began at the time of filing this return.

If the Court so finds, the decision of the Circuit Court of Appeals for the 1st Circuit must be affirmed.

II.

In the discussion of the second issue it will be assumed, for purposes of argument, that the period of limitation began with the filing of the completed return, i. e., the return filed July 14, 1919.

In addition to the arguments advanced on this point in Petitioner's brief in the Florsheim case, Respondent suggests the following:

1. The So-Called "Waiver" of January 26, 1924, was a Contract Requiring Determination, Assessment and Collection of the Tax Prior to the Time when the Tax was Collected.

In the instant case the District Court expressly held that the so-called waiver was a contract. The Court's opinion to this effect is printed in full in Appendix A.

The first Revenue Act to provide for a consent to an assessment and collection of income taxes after the time prescribed in the statute of limitations was the 1921 Act, C. 136, 42 Stat. L. 227. The provision is the one in question here. It is contained in Section 250 (d), and its pertinent language follows:

> "* * * the amount of * * * taxes due under any return made * * * under prior income * * * tax Acts, * * * shall be

> determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed * * * ."

Every subsequently enacted Revenue Act contains a provision for such a consent, except that the Act of 1924 provides for a consent as to a later assessment but not collection, and the Acts of 1926 and 1928 (the latter applying only to taxes for 1928 and later years) provide in separate sections for consents to assessment and collection, respectively, as will be discussed in detail below.

It will have been noticed from the above quoted excerpt from Section 250 (d) that the 1921 Act required the Commissioner of Internal Revenue, as well as the taxpayer, to "consent" as therein provided. If Congress had intended merely that the **taxpayer waive** the running of the statute—that he consent that the statutory period proper should extend, say, for six years instead of five years—it would have been sufficient simply to provide that the taxpayer file a waiver signed by himself alone. But the 1921 Act required the **Commissioner** to sign the paper, and in every later Revenue Act Congress has enacted the same requirement.

> Section 278 (c), Revenue Act of 1924 (C. 234, 43 Stat. L. 253, 299).
>
> Section 278 (c), (d) and (e), Revenue Act of 1926 (C. 27, 44 Stat. L. 2, 59).
>
> Section 278 (c) and (d), Revenue Act of 1926 as amended by Section 506 (a) of the Revenue Act of 1928, (C. 852, 45 Stat. L. 795, 870).
>
> Section 276 (b) and (c), Revenue Act of 1928 (C 852, 45 Stat. L. 795, 857).

The authorities are uniform to the effect that the signature of the Commissioner is essential to the validity of any paper executed pursuant to these provisions:

> Greylock Mills v. Commissioner, 31 Fed. (2d) 655 (C. C. A. 2d, April 1, 1929), where the Court found that the Commissioner had duly signed the document.
>
> Estate of Sherman v. Commissioner, 16 B. T. A. 786 (May 29, 1929).
>
> Chadbourn & Moore v. Commissioner, 16 B. T. A. 961 (June 10, 1929).

It must be supposed that Congress had a definite object in requiring the Commissioner's consent to the assessment or the collection of a tax after the expiration of the statutory period of limitation. The mere manual signing of thousands upon thousands of papers required by these sections of the statutes is no mean task. The Court of Claims has suggested, in the case of Stange v. United States (November 4th, 1929; 3 C. C. H., D-9399) that the reason for the requirement is that:

> "Congress did not intend that the Government should be bound in any way by the acceptance of waivers made by numerous collectors and revenue agents scattered all over the country, but only in case the agreement was signed by the Commissioner of Internal Revenue."

and that—

> "It was necessary for the orderly conduct of the Government's business that the Commissioner should have full knowledge of the action taken."

The statement in the last sentences does not explain the statutes if the intention was solely to provide a means of giving notice to the Government of a mere waiver by a taxpayer of the running of the statute of

limitations. It would have been simple enough to meet this requirement by providing that a waiver, signed only by the taxpayer, be **filed** in the office of the Commissioner of Internal Revenue. The explanation in the first sentence above quoted, however, seems to be the true one. Congress showed its intention that the Government should be **"bound"** by requiring the signature of the Commissioner. This conclusion is to be tested by consideration of the meaning of Section 250 (d) of the Revenue Act of 1921.

The construction of this section is made more certain by an examination of the equivalent sections of the Acts of 1924, 1926 and 1928, in which statutes the phraseology is clearer without change of substance in this particular. This aid to interpretation is utililized, and the method approved, in the following cases, among others:

Weedin v. Chin Bow, 274 U. S. 657 (1927), see pp. 667–668.

Tiger v. Western Investment Company, 221 U. S. 286 (1910), see pp. 308–309.

Wetmore v. Markoe, 196 U. S. 68, (1904), see pp. 76–77.

Johnson v. Southern Pacific Company, 196 U. S. 1 (1904), see pp. 20–21.

Cope v. Cope, 137 U. S. 682 (1891), see pp. 687–689.

Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29 (1875), see p. 36.

Examination of the later Revenue Acts shows that Congress has held to a consistent purpose to require a real **agreement** between the Commissioner and the taxpayer as to a later assessment and collection than that specified in the statute of limitations.

Section 277 (a) and (a) (2) of the Act of 1924 is followed by Section 277 (a) and (a) (3) of the Act

of 1926 in setting up the period of limitation. It is by these sections provided that, except as stated in Section 278, the amount of income and profits taxes imposed by the Revenue Act of 1918 shall be assessed within five years after the return was filed and that no proceeding for collection shall be begun after the expiration of such period.

Section 278 (c) of the 1924 Act and Section 278 (c) of the 1926 Act provide in identical language that where both the Commissioner and the taxpayer have consented to an assessment after the time prescribed in Section 277, the tax may be assessed at any time, "prior to the expiration of the period **agreed** upon." Section 278 (d) of the Act of 1926 provides that where the assessment has been made within the statutory period of limitation the tax may be collected by means therein stated, but only if proceedings are begun within six years after the assessment or "prior to the expiration of any period for collection **agreed** upon in writing by the Commissioner and the taxpayer." Section 278 (e) of this Act provides that Section 278 shall not authorize the assessment or collection of a tax if, at the time of the enactment of the 1926 Act, such assessment or collection was barred by the statute, unless prior to the enactment of the Act "the Commissioner and the taxpayer **agreed in writing thereto.**" Section 506 (a) of the Revenue Act of 1928, amends Section 278 (c) and (d) of the Act of 1926, not changing any language thereof above quoted, but providing as to both an agreement relating to assessment and an agreement relating to collection, that, "The period so **agreed** upon may be extended by subsequent **agreements in writing** made before the expiration of the period previously **agreed** upon." Section 276 (b) and (c) of the 1928 Act, which relate only to taxes

for 1928 and subsequent years, are the same as Sections 278 (c) and (d) as so amended.

From these excerpts from the Revenue Acts, it is plain that Congress contemplated a real agreement for the assessment, or the collection, as the case may be, of 1918 income taxes after the expiration of the statutory period for assessment or collection and within a time fixed by the parties. Congress repeatedly speaks of the period "agreed upon"; Congress forbade the assessment or collection (pursuant to the 1926 Act) of a tax barred by the statute unless prior to the enactment of the 1926 Act the Commissioner and the taxpayer "agreed in writing thereto"; and in the very last Revenue Act enacted, Congress expressly permits the execution of subsequent "agreements" extending the prior period "agreed upon." It should be emphasized that all of these provisions relate to taxes for the year 1918 as well as other years.

The word "consent" is synonymous with "agree". It is derived from the Latin verb "consentire," "to feel together, agree." It is defined by the Funk & Wagnalls New Standard Dictionary (1919) to mean, "To give assent, as to a contract; agree", and by Webster's New International Dictionary (1928) as, "To agree; * * * . To indicate or express a willingness; * * *." It is obvious from the excerpts from sections of the later Revenue Acts that this was the meaning of Congress in using the word "consent" in Section 250 (d).

The clear import of the section is seen, therefore, when we use the word "agree" in its proper place and apply it to the act to which the parties are to agree, viz., to a later determination, assessment and collection. The meaning is that disposition of the tax liability must be made within five years after the filing

of the return unless both the Commissioner and the taxpayer agree to a postponement of the determination, assessment and collection until after the five year period has ended. The Commissioner as well as the taxpayer is to **agree** to a **later** settlement of the tax obligation than that provided in the statute. He is to furnish a quid pro quo for the taxpayer's agreement to give him further time.

Unless this construction is taken, the intention of Congress, as expressed in Section 278 (e) of the Revenue Act of 1926, that a post-statutory period assessment or collection should not be made unless the Commissioner and the taxpayer **"agreed in writing thereto"**; all of the statutory phraseology indicating the Congressional idea that an **agreement** is required; the very requirement that the **Commissioner** as well as the taxpayer consent to the postponement—all of these are rendered fatuous and meaningless. It is submitted that no other reasonable construction can be made of the numerous above quoted expressions of the Congressional intention.

This requirement that the Commissioner furnish such consideration for the taxpayer's agreement for further time is one that we might expect Congress to enact if we consider the conditions near the end of the statutory period of limitation. The fact that in every Revenue Act, beginning with that adopted in 1921, Congress has provided a means for postponing assessment and collection by agreement furnishes sufficient evidence that frequently the Commissioner is unable, for lack of time, to make a fair determination, assessment and collection of the tax before the end of the statutory period. Picture the Commissioner and the taxpayer in such a situation. The Commissioner is faced with the necessity of making a hasty and ill-judged determination and assess-

ment and (under the 1921 Act) of collecting the tax immediately unless further time is allowed him. This would mean contest and litigation, expense and delay in arriving at a final settlement of the true obligation and on refunds the Government would, under existing statutes, be required to allow interest at the high rate of 6%. On the assurance that a thorough-going consideration of his return would be made, the taxpayer would be willing to agree to further time. Congress met the situation by providing for an agreement between the taxpayer and the Commissioner, allowing further time to the Commissioner and guaranteeing to the taxpayer that the determination should be well considered by requiring that it be **after** the end of the admittedly too brief remainder of the statutory period. It is submitted that this is a sound construction of the Act.

In this connection attention is called to paragraph 5 of the agreed statement of facts under which this case is submitted (R. p. 15), which states "That on January 26 the Plaintiff and the Commissioner of Internal Revenue **entered into an agreement** entitled 'Income and Profits Tax Waiver' * * *."

The agreement of January 26, 1924 (Exhibit "B", R. p. 11) was subject to all of the connotations of the statute as they have been outlined above. If this were not so, then the document would have no effect, for the statute provides that 1918 taxes shall be determined and assessed within five years after the filing of the return **unless** both the Commissioner and the taxpayer make the agreement which has been described and that no proceeding for the collection of such taxes shall be begun after the expiration of the five years. Therefore, if the document dated January 26, 1924, is not such an agreement, the time within which an assessment and collection of the tax

here in question might be made expired at the end of five years after the return was filed.

The effect of this agreement is that the determination, assessment **and collection** of the tax should be made, at the latest, on or before July 13, 1925. This document is not a mere waiver by the taxpayer, extending the strict statutory period of limitation. Furthermore, there is not one word in any taxing statute authorizing a waiver which shall extend the statutory period of limitation. Everywhere the subject is mentioned the reference is to a consent or agreement to a later assessment or collection, as the case may be. The inference is clear that a real agreement was intended, binding upon and giving rights to the Commissioner and the Respondent. The limitation period of five years set by the statute expired not later than July 13, 1924. Any assessment or collection to be made after that period ended was to be exclusively dependent on the agreement.

If this were not so, if the execution of the paper constituted a mere extension of the statute and the taxpayer thereafter remained subject to any further legislation affecting the statute of limitations, there would be a discrimination in favor of those taxpayers whose cases were reached by the Commissioner and disposed of before the end of the five-year period, without the execution of agreements such as the one in question here. In the case of such taxpayers no assessments could be made, except in case of fraud, whereas those whose returns were not audited, with a final settlement of claims for additional taxes made, before the five years expired, and who voluntarily executed agreements for a later determination, assessment and collection of any tax due would be subject to uncertainty as to whether, during the period of the waiver, Congress might remove or extend the bar of

the statute so that an assessment might be made after the period of the waiver and the controversy with the Commissioner be never quieted.

Congress did not intend such a situation. Congress did not provide for a general extension of the statutory period, but authorized the making of individual agreements with individual taxpayers providing for the determination, assessment and collection of taxes in accordance with the law then existing, but at a later time. It is obvious that there was no intention to leave these agreements open to later legislation changing the basis and method and time of assessment and collection. If the contrary construction were placed on the law in question it would greatly discourage the execution of such agreements. Taxpayers would prefer to pay the additional amounts claimed, sue for the recovery thereof, and allow the running of the statute to quiet any further questioning of the tax liability. Thus the purpose of Congress would be defeated.

The same reasoning rebuts the Government contention that the agreement was made under an "implied" understanding that it should be subject to future legislation. Furthermore, the agreement is **definite** on the point that the determination, assessment and collection should be made within one year after the expiration of the statutory period of limitation—that is to say, within six years from the beginning of the statutory period. It would be a startling proposition to say that this part of the stipulation was unimportant and was made with a view to a possible **additional period** of six years for collection.

It is clear, therefore, that the document dated January 26, 1924, was a contract, duly provided for by Congress, pursuant to which the Commissioner of

Internal Revenue and the Respondent agreed that the determination, assessment and collection of any tax for the year 1918 should be effected on on before July 13, 1925, at the latest.

2. Congress Could Not by Subsequent Legislation Constitutionally Alter the Terms of the Contract of January 26, 1924.

The Government contention to the contrary is predicated on the assumption that even though there is a contract obligation requiring the determination, assessment and collection of the tax within a certain time, the time may be extended by later legislation changing the period of limitation. But this point cannot be sustained, because, although it may be true that the legislature may properly extend or remove the statute of limitations applicable to the enforcement of an ordinary contractual obligation—Campbell v. Holt, 115 U. S. 620 (1885)—it does not follow that **where the contract itself fixes the period of limitation,** the bar may be extended or removed by legislative enactment. New York Central Railroad Company v. Lazarus, 278 Fed. 900 (C. C. A., 2d, 1922). In this case the contract (a bill of lading) fixed a two-year limit. The plaintiff, being barred by this provision, contended that the Transportation Act of 1920 suspended the limitation during the period of Federal control. The Circuit Court of Appeals for the Second Circuit held that the Transportation Act was not intended to suspend the limitation period in such a case and that if the Act was intended to effect such a result the legislation would be in violation of the Fifth Amendment of the Federal Constitution.

The circumstance that the Government of the United States is a party to the contract in the case at bar does not affect the conclusion. The Govern-

ment is subject to the substantive law as to contract rights and liabilities to the same extent as a citizen. It may not deprive a citizen of his property without due process of law by changing the terms of his contract, and this principle is peculiarly applicable where the Government is a party to the contract.

The respondent's position on this point is sustained by the Sinking-Fund Cases, 99 U. S. 700 (1878.) Briefly stated the facts there were that contracts had been made between the Government and the Union Pacific Railroad Company and the Central Pacific Railroad Company pursuant to which the two companies agreed to pay to the United States, at a certain date, the amount of certain "subsidy bonds", and to apply toward the liquidation of the debt, as earned, one-half of their compensation for services in carrying troops and mail for the Government and also 5% of net earnings; but by subsequent statute provision was made that the other half of such compensation, and the amount of 25% of net earnings, should be paid into a sinking fund to be held by the Government as security for the payment of the indebtedness. One railroad sued in the Court of Claims to recover amounts of compensation for services credited to the sinking fund, and a stockholder of the other company sued the company to compel it to comply with the subsequent statute.

The opinion of the Court was divided. That of the five justices constituting the majority was delivered by Mr. Chief Justice Waite. At the very beginning of the opinion the Court **accepts** the doctrine that the Government cannot constitutionally repudiate the terms of a contract by which it is bound with a citizen, using the following language:

> "The single question presented by the case of the Union Pacific Railroad Company is as to the

constitutionality of that part of the Act of May 7, 1878, which establishes in the treasury of the United States a sinking-fund. * * *

"They (the United States) are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. **Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.** No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

"* * * The precise point to be determined now is, whether a statute which requires the company in the management of its affairs to set aside a portion of its current income as a sinking-fund to meet this and other mortgage debts when they mature, deprives the company of its property without due process of law, or in any other way improperly interferes with vested rights." (pp. 718–719.)

The majority of the court held that Congress had expressly reserved, in the prior legislation which was considered to be the original contract, the right to make the change which was complained of, and that

accordingly the railroads were not deprived of their property in violation of the Fifth Amendment.

There were dissenting opinions by Mr Justice Field, Mr. Justice Strong and Mr. Justice Bradley on the ground that the contract did not contain such a reservation of the power to make the change in question. All three of the dissenting justices, therefore, were of the opinion that the railroads had been deprived of their property without due process of law (pp. 737–8; 746–7; and 766). Two of the justices were furthermore convinced that, although there is no express constitutional prohibition on the point, Congress is not by the Constitution permitted to pass any law imparing the obligation of a contract, entirely apart from the provision of the Fifth Amendment (pp. 736–737 and 762–766).

The significant point in this case is that all of the eight justices participating in the decision were agreed on the one conclusion that Congress may not alter the terms of a contract between the Government and a citizen without violation of the Federal Constitution.

The **Sinking-Fund Cases** directly refute the contention of the Government in the case at bar that the 1924 Act changed the terms of the so-called "waivers" in effect at the time of its enactment. Such waivers, we have seen, were, in accordance with the clearly expressed intention of Congress, contracts between the Government and the taxpayers providing that a determination, assessment and collection of taxes for particular years should be made on or before certain dates. Any determination, assessment or collection made within the period fixed by such a contract would be exclusively dependent on the contract for its validity. There is no reason, from the fact that the subject was taxes, that such a contract should not be

made. It has frequently been held that the sovereign power of the states relating to taxation may be limited by contracts exempting property or persons from the future imposition of taxes.

New Jersey v. Wilson, 7 Cranch 164 (1812).
Home for the Friendless v. Rouse, 8 Wall., 430 (1869).
Murray v. Charleston, 96 U. S. 432 (1877).

The power of Congress may similarly be limited by contracts made pursuant to statute; in fact such limitations have been provided in certain Liberty Bond issues; and the validity of such contracts has been impliedly recognized in the case of National Life Insurance Company v. United States, 277 U. S. 508 (1928). If a government may provide for contracts limiting the very **power** to tax in the future, there is no reason it may not authorize a contract fixing a time within which a particular tax may be **assessed and collected.**

If Congress may change the terms of a contract providing for a determination, assessment and collection of a tax within a certain time, it may provide that the **determination and assessment** may be made any number of years later than the date set therein. The great prejudice to the taxpayer in such event is obvious. In the case at bar it is only the date for collection which it is claimed was changed by the subsequent statute. But the prejudice to the respondent would be as serious as that resulting from a change in the time for determination and assessment. The time remaining for a collection of the tax pursuant to the contract in this case was about one year, and the Government contends that the 1924 Rct extended this time so that the Government might make a collection at any time during a further period of

nearly six years. Such a change would render useless any plans the respondent may have made to meet the financial demand upon it, and would seriously affect its ability to produce the necessary witnesses, and evidence generally, in the event that it should desire to contest the propriety or legality of the collection when made. It should be remembered that the tax in question is alleged to have been due upon income for the year 1918; and that **the Government contends that the 1924 Act would have permitted a collection at any time up to the 17th day of March, 1931, or more than twelve years after the end of the taxable year.**

The effect of the agreement between the respondent and the Government was that the assessment and the collection should be made on or before July 13, 1925, at the very latest. But, nearly a year and one-half after this date, the Government seized the respondent's property to enfore collection (R. p. 16). There could hardly be a clearer case of deprivation of property without due process of law.

To meet the foregoing arguments the Government contends that the so-called waiver executed by both the Commissioner and the taxpayer should not be construed as constituting a contract, but "is merely a consent in writing * * * to the extension of the statutory period for the assessment of the taxes." Respondent respectfully suggests that to argue that a consent in writing executed by both parties is not a contract is to quibble over terms, which can serve no useful purpose.

The case of Bank of Commerce against Rose (government's brief p. 21), like the Circuit Court decision in the Florsheim case, is based on the erroneous premise that the so-called waiver in some way oper-

ates to extend the poriod of limitation provided by the statute and furthermore assumes that authority to do so is given by the taxing statutes. Since this is dealt with fully and completely in Petitioner's brief in the Florsheim case, no further argument will be advanced to show its fallacy. The case of Loewer Realty Company against Anderson (government's brief p. 21) is obviously not in point. The Respondent, however, is very glad to adopt the language of that case quoted by the government that "The taxpayer should not in any event be allowed to repudiate a consent upon which the Commissioner has relied." By the same token the Commissioner should not in any event be allowed to repudiate a consent upon which the taxpayer has relied. Although the Petitioner in its brief (at p. 22) cites the case of Stange v. United States, recently decided by the Court of Claims, it is not quite clear how this case can be said to support our Petitioner's position. So far as the Stange case has any application it is to the effect that waivers signed by both the Commissioner and the taxpayer constitute contracts between the parties and are presumably binding on the parties.

CONCLUSION.

In conclusion the Respondent's contentions may be summarized as follows:

1. The additional taxes involved in this case were illegally collected because they were not assessed within the period of time provided by law for their assessment.

2. The additional taxes involved in this case were illegally collected because they were not collected within the period of time provided by agreement or by law for their collection.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

FRANK S. BRIGHT,
Attorney.

HAROLD C. HASKELL,
Of Counsel.

APPENDIX A.

HOOD RUBBER CO. vs. WHITE, COLLECTOR
28 Fed. (2d) 54.

Lowell, District Judge:

These were two actions to recover Income and Excess Profits taxes for the years 1918 and 1919, paid under protest. The facts are similar and it was agreed at the hearing that the determination of one of them would carry with it the decision of the other.

On March 14, 1919, the Plaintiff filed an estimated return of profits for the year 1918 in the sum of $300,000 and paid at the same time the first quarterly installment of $75,000. The return was made out on a paper called a "Tentative Return and Request for Extension of Time". The time for filing a completed return was twice extended, the last date being July 14, 1919. In the meantime, the Commissioner had demanded and the Plaintiff had paid a second quarterly installment of $75,000. The completed return was filed on July 14, 1919. On January 26, 1924, the Plaintiff and the Commissioner came to an agreement extending the time of assessment and collection of the taxes for one year beyond the statutory period of limitation (five years in all). This instrument was as follows:

"January 26, 1924.

"Income and Profits Tax Waiver

"In pursuance of the provisions of Subdivision (d) of Section 250 of the Revenue Act of 1921, Hood Rubber Company and affiliated companies of Watertown, Massachusetts, and the Commissioner of Internal Revenue hereby consent to the determination, assessment, and collection of the amount of Income, Excess Profits, or War Profits taxes due under any return made by or on behalf of the said companies for the year 1918 under the Revenue Act of 1921, or under prior Income, Excess Profits, or War Profits Tax Acts. * * * This waiver is in effect from the date it is signed by the taxpayer and will remain

in effect for a period of one year after the expiration of the statutory period of limitation or the statutory period of limitation as extended by any waivers already on file with the Bureau within which assessments of taxes may be made for the years mentioned."

The Commissioner assessed the taxes on March 18, 1925, and collected them by distraint on December 15, 1926.

The Plaintiff contends that the taxes were illegally assessed and collected as both the assessment and collection were made after the expiration of the time allowed by the waiver.

Two questions arise:

FIRST—Was the assessment made in time; and

SECOND—Was the tax collected in time?

The first question depends upon the meaning of the word "return" as used in the statute. The waiver construed in connection with the statute allowed five years from the return in which to make the assessment. If the word "return" refers to the tentative return, the Government did not assess the tax in time. If, however, it refers to the completed return, the assessment was made within the required five years. This question, which is not free from doubt, need not be decided as even if it be granted that the assessment was made in time, the tax was not collected within five years from the date of the completed return.

1. The Government's contention that the waiver did not limit the time for the collection of the tax to six years is unsound. The Government takes advantage of the six year period for assessment and then says that the six year period for collection was changed by the later statute of 1924, which allowed six years for collection. The Government cannot have its cake and eat it, too. Either the waiver conferred no power on the Government to make the assessment later than the statutory period allowed or it set up a six year restriction on collection as well as assessment. It is distinctly unfair for the Government to take advantage of one part of the waiver and refuse to be bound

by the other part of it. The statement made in the Government's brief and in some of the cases—that the waiver was made by the taxpayer and the Commissioner with future statutes in view—seems far fetched. A distinct limitation of six years (one year more than the period then prescribed by statute) was expressly put in the waiver, showing that the five-year period was a matter of importance to both sides. As the taxing statutes were being changed at nearly every session of Congress, the parties would undoubtedly have referred to future taxing acts had they had them in mind.

The Government cites cases to the effect that "No officer of the Government has the right to waive a statute of limitations in favor of the United States". See for instance De Arnaud v. United States, 151 U. S. 483. These cases are sound law, but they apply only to statutes of limitation then in force and not the ones which are prescribed by Congress in later acts. In this case the Commissioner did not waive a statute of limitation. It was the taxpayer who waived it and gave more time to the Commissioner to assess and collect the taxes.

2. The Government also contends that Congress had the power to change the time for collection set up by the waiver without thereby infringing any of the Plaintiff's constitutional rights. This argument is unsound. It was to the advantage of both parties that the period of limitation be extended and it was of especial advantage to the Plaintiff that it should know when the taxes might be considered as unenforcible so that it might properly arrange its financial affaris. This seems to be clearly a cose of a binding contract which cannot be varied by subsequent legislation. C. & N. W. Ry. Co. v. United States, 104 U. S. 680.

The Government cites certain paragraphs from the opinion of the Board of Tax Appeals in Sunshine Coat & Suit Company, Petitioner, v. Commissioner, 10 B. T. A. 971, in support of it contention in the present case. That case was rightly decided as the collection of the tax was not mentioned in the last two of the

three waivers which were there in suit, so that the assessment having been made in time, the provisions of the Act of 1924—allowing collection to be made within six years of a valid assessment—came into force. The passages in the opinion cited by the Government were not necessary to the decision in the case and, therefore, do not carry with them as much weight as if they were not obiter dicta.

Judgment for the Plaintiff.

SUPREME COURT OF THE UNITED STATES.

Nos. 118 and 414.—October Term, 1929.

118	Florsheim Brothers Drygoods Company, Ltd., Petitioner, *vs.* The United States.	On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
414	Thomas W. White, Collector, Petitioner, *vs.* Hood Rubber Co.	On Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 24, 1930.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases, which were argued together, present the same questions. In each case, the taxpayer seeks to recover with interest an amount assessed and collected, after March 15, 1925, as an additional income and excess-profits tax for 1918 under the Revenue Act of 1918. In each, the claim is that both the assessment and the collection were made after the expiration of the time allowed therefor. In a long line of cases arising out of similar facts, the Board of Tax Appeals has held consistently that neither the assessment nor the collection was made too late.[1] In No. 414 the action was brought in the federal court for Massachusetts against the Collector to recover $39,043.99. The District Court, without passing on the timeliness of the assessment, held that the collection was barred and entered judgment for the plaintiff, 28 F. (2d) 54. The

[1]Appeal of Dallas Brass & Copper Co., 3 B. T. A. 856, 863; Appeal of Boston Hide & Leather Co., 5 B. T. A. 617; Pilliod Lumber Co. *v.* Commissioner, 7 B. T. A. 591, 593; Corona Coal & Coke Co. *v.* Commissioner, 11 B. T. A. 240; Ramsey *v.* Commissioner, 11 B. T. A. 345; Floyd *v.* Commissioner, 11 B. T. A. 903, 905; David Rodefer Oil Co. *v.* Commissioner, 11 B. T. A. 782; L. Loewy & Son, Inc. *v.* Commissioner, 11 B. T. A. 596; Peck, Stow & Wilcox *v.* Commissioner, 12 B. T. A. 569; Lamborn *v.* Commissioner, 13 B. T. A. 177, 189; Kaufman *v.* Commissioner, 14 B. T. A. 602.

Circuit Court of Appeals for the First Circuit affirmed the judgment on the ground that the assessment was barred, and expressed no opinion on the question decided by the District Court, 33 F. (2d) 739. In No. 118, the action was brought in the federal court for western Louisiana against the United States to recover $11,282.15. That court, deciding both questions in favor of the Government, entered a judgment for the defendant, 26 F. (2d) 505, which was affirmed, on both grounds, by the Circuit Court of Appeals for the Fifth Circuit, 29 F. (2d) 895. In other federal courts, also, there has been diversity of opinion.[2] This Court granted writs of certiorari, 280 U. S. —.

First. Whether the assessment was barred depends upon whether the period of limitation was started by the filing before March 15, 1919, of a so-called "tentative return," or by the later filing of a so-called "completed return". The question arises in this way. The Revenue Act of 1918 was not approved until February 24, 1919; c. 18, 40 Stat. 1057. Section 241 (a) required that returns on the basis of the calendar year should be made on or before the 15th day of March. Section 239 required that a corporation's return should state "specifically the items of its gross income and the deductions and credits allowed." The form of return prescribed by the Commissioner of Internal Revenue for giving this information, known as Form 1120, is an elaborate document composed of a "summary" in four schedules, with eleven supporting schedules and twenty-six sub-schedules. The "summary" calls for the specification of some 93 items. The supporting schedules and sub-schedules call for the specification of some 357 items; and of as many more items to be stated in appendices as the circumstances of the particular taxpayers might require.[3]

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[2]In Brandon Corporation *v.* Jones, 33 F. (2d) 969 (D. C. E. D. S. Car.), it was held that both assessment and collection were barred. And see Rasmussen *v.* Brownfield-Canty Carpet Co., 31 F. (2d) 89. In the following cases it was held that collection was not barred; the timeliness of the assessment was not questioned: Bank of Commerce *v.* Rose, 26 F. (2d) 365 (D. C. N. D. Ga.); Loewer Realty Co. *v.* Anderson, 31 F. (2d) 268 (C. C. A. 2nd); L. Loewy & Son, Inc. *v.* Commissioner, 31 F. (2d) 652 (C. C. A. 2nd).

[3]The form described is known as Form 1120, "Corporation Income and Profits Tax Return For Calendar Year 1918," and is a combined return of income, excess-profits and war-profits under the Revenue Act of 1918. Statutes imposing direct taxes have always required taxpayers to file "lists" or

It was obvious that many corporations would be unable, in the short interval between February 24 and March 15, to prepare their returns in time. Sections 227 (a) and 241 (a) authorized the Commissioner to "grant a reasonable extension of time for filing returns whenever in his judgment good cause exists." But § 250 (a) provided that "where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension." The necessities of the Government made it undesirable that payments on account of the first instalment of taxes be postponed. To meet this situation, the following policy was announced in a public statement issued by the Commissioner: "Although no general extension of time will be authorized for filing the Federal Income Tax returns due March 15, the Commissioner of Internal Revenue has approved a novel feature of tax collection which will serve for all practical purposes as a possible extension of forty-five days for the filing of corporation income and excess profits tax returns . . . If a corporation finds that . . . it is impossible to complete its return by March 15, it may make a return of the estimated tax due and make payment thereof not later than March 15. If meritorious reason is shown", the completed return could be filed within forty-five days after that date. The statement continued: "Provision for systematically handling this new feature will be made in the construction of the new return blanks. . . embodied in which is a detachable letter of remittance. Any corporation which finds that, for sufficient reasons, it cannot complete its return by March 15, may detach and fill out the letter of remittance, and forward same to the collector on or before March 15, together with a check . . . for the tax due on that date. . . . A statement in writing of the reasons why it is impossible for the corporation to complete the return by the specified date

"schedules" or "statements" or "returns" specifying in detail the information requisite for an assessment of the tax. The word "return" has not always been used. Sometimes it has been used as a synonym for "list", "schedule" or "statement." The specification in the statutes of the prescribed contents of such lists or returns has varied in its detail. But always definite statements of facts were required, from which the tax could be computed. Act of July 9, 1798, c. 70, § 9, 1 Stat. 580, 585-6; Act of July 1, 1862, c. 119, §§ 6, 93, 12 Stat. 432, 434, 475; Act of June 30, 1864, c. 173, §§ 11, 82, 98, 102, 109, etc., 13 Stat. 223, 225, 258-86; Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 114; Rev. Stat. § 3173, U. S. C., Tit. 26, § 93.

must accompany every such remittance".[4] The device was modified by a further statement on February 27, 1919. A separate blank, known as Form 1031T and entitled "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return", was to be used instead of the detachable letter of remittance. This blank was in the form of a letter to the collector and contained, besides instructions and the oath of the president and treasurer, only a statement that one-fourth of the estimated amount of taxes was remitted therewith and that an extension of time to file the complete return was requested for the reasons stated.

Each corporation executed the tentative return, Form 1031T, and sent it, with a remittance of one-quarter of the estimated tax, to the collector on or before March 15, 1919. The Florsheim Company filed its complete return, Form 1120, on June 16, 1919; the Hood Company, on July 14, 1919. Section 250 (d) of the Revenue Act of 1918 provided that "the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made . . ." This period was extended under the Revenue Act of 1921, November 23, 1921, c. 136, § 250 (d), 42 Stat. 227, 265-6, which provided that the amount of the tax under the 1918 Act should be "determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax".[5] In each of the cases at bar, the Commissioner and the taxpayers executed, prior to March 15, 1924, an instrument called "Income and Profits Tax Waiver." The waivers stated that "In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921," the Commissioner and the taxpayer "consent to a deter-

[4]This action was taken pursuant to § 1309, which authorized the Commissioner, with the approval of the Secretary, "to make all needful rules and regulations for the enforcement of the provisions of this Act." These public letters from the Commissioner to the Collectors "and others concerned" were issued February 13, 1919; February 27, 1919. See also letters of April 14, 1919, October 3, 1919 and March 17, 1920; and Manual (1920) for the information and guidance of Collectors, §§ 627, 628.

[5]This period of limitation on assessments of taxes under the 1918 Act was continued in the later Revenue Acts. June 2, 1924, c. 234, §§ 277 (a) (2), 278 (c), 43 Stat. 253, 299, 300; February 26, 1926, c. 27, §§ 277 (a) (3), 278 (c), 44 Stat. 9, 58, 59.

mination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made. . . . This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation. . . ." In each case, the assessment was made more than six years after March 15, 1919, but within six years after the filing of the completed return on Form 1120. If Form 1031T was "the return" within the meaning of the above provisions as to limitation, then the assessments were made too late.

We are of opinion that the filing of the document known as Form 1031T, duly executed, did not start the running of the period of limitation. Form 1031T is not an instrument expressly provided for in the Act. It is not in the nature of a "list," "schedule," or "return," commonly required by tax statutes. It was an invention of the Commissioner designed to meet a peculiar exigency. Its purpose was to secure to the taxpayer a needed extension of time for filing the required return, without defeating the Government's right to prompt payment of the first instalment. As Form 1031T made no reference to income, or to deductions or credits, it could not have been intended as the return "stating specifically the items of . . . gross income, and the deductions and credits"— the return required to satisfy the statute.

Section 3182 of the Revised Statutes, U. S. C. Tit. 26, § 102, provides that the Commissioner shall "make the inquiries, determinations, and assessments of all taxes . . . and shall certify a list of such assessments . . . to the proper collectors." Section 250 (b) of the 1918 Act required that "as soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed." It was to serve these purposes that § 239 required all corporations to make returns "stating specifically the items of . . . gross income and the deductions and credits." The burden of supplying by the return the information on which assessments were to be based was thus imposed upon the taxpayer. And, in providing that the period of limitation should begin on the date when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed man-

ner. Form 1120 provided for furnishing the data which would enable the Commissioner to make a determination, assessment and recomputation. Form 1031T furnished no data which could, in any way, aid him in that connection. It is true that even the complete return on Form 1120 need not be accepted by the Commissioner as the sole basis for the determination of the amount of the tax. Assessments are frequently based on audits of the Income Tax Unit. However, the purpose of these audits is not to eliminate the necessity of filing the return, but to safeguard against error or dishonesty.

The corporations concede that § 239 defined the nature of the return required and referred to in the several provisions of the Act, and that Form 1031T did not comply with that section; but, in support of their contention that the tentative return, Form 1031T, started the running of the period of limitation, they present the following arguments. They urge that the sufficiency of a return for the purpose of starting the period of limitations does not depend upon a strict compliance with the requirements of § 239; that the Act required but one return, that Form 1031T was a formal document prescribed by the Commissioner, called a "return" and so termed on its face, and that the complete return should, therefore, be treated as an amendment or completion of the tentative return; that Form 1031T was a sufficient return to start the period of limitation, because it was sufficient to prevent the extension of time for the payment of the first instalment of the tax pursuant to § 250 (a); because it was a sufficient return under § 250 (e) to constitute notice and demand for the payment of the first instalment; because it was a sufficient return to form the basis of an assessment, which, under the law, must be based on a return; and because it was a sufficient return to subject taxpayers to the penalties provided by § 3176 of the Revised Statutes and § 253 of the Act, for failure to file it on time.

These arguments ignore the differences in nature and purpose between Form 1031T and the return required by the Act. The mere fact that Form 1031T was a formal document prescribed by the Commissioner and termed a "return" does not identify it as the return required by the act. The word "return" is not a technical word of art. It may be true that the filing of a return which is defective or incomplete under § 239 is sufficient to start the

running of the period of limitation; and that the filing of an amended return does not toll the period.[6] But the defective or incomplete return purports to be a specific statement of the items of income, deductions and credits in compliance with § 239. And, to have that effect, it must honestly and reasonably be intended as such. There is not a pretense of such purpose with respect to Form 1031T. Nor is it the purpose of Form 1120 to supply or correct something omitted or misstated in Form 1031T. The latter was neither defective nor incomplete. The extension of time for the payment of the first instalment was prevented, not because Form 1031T was considered a return in compliance with the statute, but because the Commissioner exacted payment as a condition for the requested extension of time to file the return. The penalties were to be imposed for the failure to file, or the late filing, of the detailed return above described. And the penalties were avoided, not by the filing of Form 1031T as a substantial compliance with the requirement of a return, but, as expressly stated in that form, by the extension of time to file which was granted "in consideration of the filing of this tentative return and the payment of not less than one-fourth of the estimated amount of the tax, and for the reasons stated." Obviously, without the payment of the first instalment and the consequent grant of an extension of time, the mere filing of Form 1031T would not have avoided the penalties prescribed for the late filing of the return required by the Act.[7] Nor would the penalties have been avoided by the filing of that f rm, if the complete return were not filed within the extended time.

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[6]See Appeal of National Refining Co., 1 B. T. A. 236; Appeal of Mabel Elevator Co., 2 B. T. A. 517; United States *v.* National Refining Co., 21 F. (2d) 464; United States *v.* Mabel Elevator Co., 17 F. (2d) 109; Union Pac. R. Co. *v.* Bowers, 24 F. (2d) 788; National Tank & Export Co. *v.* United States, 35 F. (2d) 381.

[7]Attention is called to Article 407 of Internal Revenue Regulations 45, which provided that: "In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time, a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form." But obviously Form 1031T was not a tentative return within the meaning of this Article. It did not even purport to be a "statement disclosing gross income and the deductions therefrom."

The contention that because Form 1031T was sufficient as a notice and demand under § 250 (e), it was a sufficient return to start the period of limitation, is equally unsound. That section did not prescribe the exclusive mode for the notice and demand for payment of the first instalment. Any instrument containing the notice and demand would be as efficacious for that purpose as the return required by the statute. Finally, the argument that Form 1031T was a sufficient return to furnish the basis for assessment lacks significance, whether or not it is sound.[8] The Commissioner is not confined to the taxpayer's return for the basis of his assessment. He may secure additional information; and he may assess the tax even if the taxpayer files no return. Rev. Stat. § 3176, U. S. C. Tit. 26, § 97; Revenue Act 1918, § 250 (c). The mere fact that, in the absence of any information, the Commissioner might be compelled to assess the tax on the basis of the taxpayer's estimate, does not transform that simple estimate of the amount of the tax into the detailed return of the items of gross income, deductions, and credits required by the Act. Form 1031T was only a formal substitute for the simple letter originally planned, remitting payment and requesting an extension. That it was called "Tentative Return" is of no significance. It was termed also "Estimate of Corporation Income And Profits Taxes And Request For Extension Of Time For Filing Return."

It has been said that the Government is assuming an inconsistent and unconscionable attitude. But there is nothing inconsistent or unconscionable in its position. The Commissioner did not represent that the date of filing Form 1031T would be treated as the beginning of the period of limitation. And it is not clear that he had the power to shorten the period prescribed by the statute. The Government has not treated Form 1031T for any purpose as the return required by the Act. The tentative return was confessedly a novel device. It imposed no hardship on taxpayers. Indeed, it enabled them to save the interest charge which otherwise would

[8]To sustain the argument that assessment could be made on the basis of Form 1031T, counsel cited only Matteawan *v.* Commissioner, 14 B. T. A. 789 and Lamborn *v.* Commissioner, 13 B. T. A. 177, 187. But it is not clear that in either of these cases, the assessment was in fact made on the basis of that form. In both cases there were other bases; and in both cases the Board of Tax Appeals expressly refused to comment on the propriety of assessment based on Form 1031T. See Appeal of Matteawan Mfg. Co., 4 B. T. A. 953, 956.

have attended an extension of time to file the return and pay the first instalment. Notice of the Commissioner's intention to assess deficiencies in stated amounts was given to the corporations much before March 15, 1925. The delay in the assessments past that date was due to negotiations with the Commissioner which resulted in the reduction of those amounts to less than half in the one case and to about one-sixth in the other. The corporations are in no position to complain of the Government's action.

Second. The claim that, even if the assessment was timely, the collection was barred, depends upon the effect of the "Income and Profits Tax Waiver," and the applicability of the Revenue Acts of 1924 and 1926. As previously stated, both corporations and the Commissioner executed this instrument pursuant to § 250 (d) of the 1921 Act, prior to March 15, 1924, and consented to the determination, assessment and collection of the tax, "this waiver" to be in effect for one year after the expiration of the statutory period of limitation. Under the 1921 Act, § 250 (d), this period was five years after the return was filed. The Revenue Acts of 1924 and 1926 extended the period for collection to six years after the date of assessment; June 2, 1924, c. 234, § 278 (d), 43 Stat. 253, 300; Feb. 26, 1926, c. 27, § 278 (d), 44 Stat. 9, 59. In both cases proceedings for collection of the tax were begun more than six years after either the tentative or the complete returns were filed, but less than six years after the assessments were made. In the *Florsheim* case, collection was effected in 1925; in the *Hood* case, in 1926, after the passage of the 1926 Act.

The Government contends that the "Income and Profits Tax Waivers" executed by the corporations were waivers by them of the statutory period for another year; that while these waivers were still in force and while the corporations' liability was thus still alive, the Revenue Acts of 1924 and 1926 were passed, increasing the period for collection to six years after assessment; that these Acts are applicable to the cases at bar; and that, since the collections were made within six years after the assessments, they were timely made. The corporations insist that the "Waivers" were not merely waivers extending the statutory period, but were binding contracts which limited the time in which the Commissioner could assess and collect the taxes; and that no change in the law made after the date of the contracts and enlarging the time for collection can affect their rights. They urge that the 1924 and

1926 Acts did not purport to extend the periods thus limited by contract; and that, if construed as extending such periods, the provisions of these acts are unconstitutional. They concede that, in the absence of contract, a legislature may constitutionally lengthen or shorten the period in which a right may be enforced by legal proceedings.

We are of opinion that the contention of the Government must prevail. The waivers executed by the parties were not contracts binding the Commissioner not to make the assessments and collections after the periods specified. At the time when the waivers were executed, the Commissioner was without power under the statute to assess or collect the taxes after the statutory period, as extended by the waivers. A promise by the Commissioner not to do what by the statute he was precluded from doing, would have been of no significance. The waivers do not purport to contain such a promise. *Bank of Commerce* v. *Rose*, 26 F. (2d) 365, 366; *Greylock Mills* v. *Commissioner*, 31 F. (2d) 655, 657. And obviously, the Commissioner did not undertake to limit the power of Congress to extend the period of limitations, as consideration for the waivers. The instruments were nothing more than what they were termed on their face—waivers; and that was all to which the Commissioner was authorized to consent.

Stress is laid on the use of the words "agree" and "agreement" in the Acts and Regulations. But these are ordinary words having no technical significance. It is also urged that, unless a contract was intended, there is no reason why the consent of the Commissioner should have been required. But an otherwise plain meaning should not be distorted merely for the sake of finding a purpose for this administrative requirement. If a reason must be found, it exists in the general desirability of the requirement as an administrative matter. It serves to keep the Commissioner in closer touch with the matters which he is charged to administer. It avoids claims of improvident execution of waivers and unauthorized exactions by subordinates of the Department for the purpose of curing their own delinquencies. And it provides a formal procedure which is generally desirable for the Commissioner, collectors, and subordinates in the Department. That other means might have been devised for the same purpose is of no significance.

The question as to the applicability of the later Acts may be briefly disposed of. Section 1100 of the Revenue Act of 1924 re-

pealed the 1921 Act. Section 277 (a) (2) of the 1924 Act[9] expressly dealt with taxes due under the Acts of 1918 and 1921; and it reenacted the five year limitation with the express qualification, "Except as provided in section 278". Section 278 (c)[10] reenacted the provision as to extension of time by the consent of the Commissioner and the taxpayer; and constituted the sole statutory authority for the waiver of the period of limitation for taxes due under the 1918 and 1921 Acts. It unquestionably applied to waivers thereafter to be executed; and no reason appears why it did not equally apply to waivers executed prior to the passage of the Act. Section 278 (d)[11] prescribed the period of limitation for the collection of taxes applicable to all cases enumerated in that section and § 277, which expressly included taxes under the Act of 1918. The situations intended to be excluded from the limitations prescribed were carefully specified in § 278 (e)[12]: (1) assessments or collections already barred before the passage of that Act and (2) assessments made and proceedings begun prior to that time. Neither of the cases at bar falls within those exceptions. Since, in both cases, assessment and collection were not barred on the enactment of the 1924 Act, and were made after that date, the section is applicable. Compare *Russell* v. *United States*, 278 U. S. 181.

It is urged that this construction of the Acts causes discrimination against taxpayers who obligingly consented to additional time for assessment and collection, and in favor of those who obdurately refused such consent or whose returns were not audited, prior to the bar of the statute, for the purpose of assessing deficiencies. That taxpayers whose returns led to no suspicion of inaccuracy prior to the expiration of the statutory period are in a preferable position is due, not to any unjust discrimination contained in the 1924 or 1926 Acts, but to the quality of their returns and to propitious circumstances. For the disobliging taxpayers, the Acts provided an alternative remedy in the so-called jeopardy assessment and demand; 1924, § 274 (d), 43 Stat. 297; 1926, § 279, 44 Stat.

[9] § 277 (a) (3) of the 1926 Act.

[10] § 278 (c) of the 1926 Act.

[11] § 278 (d) of the 1926 Act.

[12] § 278 (e) of the 1926 Act. This section eliminated the second exception in § 278 (e) of the 1924 Act, stated in the text. The fact that, in the *Hood* case, where collection was made after the enactment of the 1926 Act, the assessment had been made previous to that time, is, therefore, immaterial.

59. It is urged also that the Government may not properly and consistently accept the consent contained in the "Waivers" and not be bound by the limitation. But the limitation was only on the corporations' consent; and the Government was bound thereby. The instruments contained nothing, however, which could restrict the Government's power to enlarge the statutory provisions as to limitation. The timeliness of the collection is based not upon the waivers, but upon the statutes.

No. 118, Affirmed.
No. 414, Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.